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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1931

No. [redacted] /

The Port Rate-Relation Case

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, et al.,

versus *Appellants,*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, et al.,

Appellees.

Appeal from the United States District Court for the Southern District of Texas, Galveston Division.

BRIEF ON BEHALF OF THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLANT

T. J. FREEMAN,
T. D. GRESHAM,
ESMOND PHELPS,
ROBERT L. W. THOMPSON,
Solicitors for said Appellant.

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TABLE OF CONTENTS

Page

Statement:

1. References to official reports of decisions of the lower court and of the Commission ... 2

2a. Proceedings before the Commission (1921-25) ... 3

2b. Proceedings before the Commission (1926-27) ... 9

2c. Proceedings before the Commission (1928-29) ... 15

3. Proceedings in the lower court ... 19

4. Finding of Probable Jurisdiction ... 23

Specification of Errors ... 24

Brief of Argument ... 44

The Texas and Pacific Railway Company:

Prefatory Remarks ... 45

Its Origin and Corporate Creation ... 46

Its Physical Development and Location ... 48

Its Financial History and Structure ... 51

Its Traditional Policy as to Port Equalization ... 55

Effect of the Prescribed "Differentials" on this Appellant ... 60

I. An order of the Commission will be voided and set aside—

(1) if violative of constitutional limitations, or

(2) if not within the scope of its statutory authority ... 71

(3) if based upon a misinterpretation of the law, or

(4) if based upon an erroneous conception of its powers and duties ... 72

(5) if unsupported by competent evidence, or

(6) if contrary to or in disregard of unrefuted facts established of record ... 72

(7) If, although purporting to act within the form of its delegated authority, its action is so arbitrary and unreasonable as in fact to be in excess thereof ... 73

II. In an action to restrain the enforcement of an order of the Interstate Commerce Commission, the Supreme Court

will determine whether, as a matter of law, the Commission's findings of fact sustain its conclusions of law and its order based thereon 74

III. Common carriers have the right and authority, under existing law, to determine initially their rates and rate policies in the exercise of managerial discretion, subject to correction only if determined after proper hearing and review to be illegal 76

IV. In view of the Commission's explicit declaration that the Texas & Pacific Railway Company and the Louisiana Railway & Navigation system (now in part the Louisiana & Arkansas Railway Company), neither of which serves with its own rails any of the Texas gulf ports, have no controlling voice in fixing the level of the assailed rates thereto, the maintenance by them (as quasi-proportional rates) of the same rail rates on shipments of foreign and coastwise traffic to and from New Orleans and other Louisiana ports served by them as are contemporaneously maintained on like traffic to and from Galveston or any of the other Texas ports by competing carriers does not, as a matter of law, result in undue prejudice to the latter or undue preference of the former 82

V. The law confers upon the Commission no power or authority to manipulate rates so as to counteract any natural or commercial advantages (whether real or fancied) which the port of New Orleans and other Louisiana ports may have over the port of Galveston and adjacent Texas ports, and thereby artificially divert the movement of traffic away from the former and the carriers serving them and to the latter and the carriers serving them 115

VI. Since the established legislative policy of the Congress is to promote and maintain freedom of competition in commerce, the refusal of the Commission to give consideration to the competitive nature of the traffic herein under review, and to all the circumstances and conditions attendant thereupon, including the water rates beyond the ports, is contrary to the requirements of the law 123

VII. The orders of the Commission under review herein are repugnant to and in violation of the constitutional limitation upon the power of the Congress to give a preference by regulation of commerce or revenue to the ports of one state over those of another 145

VIII. The voluntary maintenance by the carriers of New Orleans, as to quasi-proportional rail rates on foreign and coastwise traffic which moves through the ports, on a parity with Galveston or with any other Texas gulf port

(even though such rates be lower than the rates contemporaneously maintained by them on domestic shipments of such traffic between New Orleans and the same interior points) does not and can not, as a matter of law, give rise to undue preference of the former or undue prejudice to the latter. Likewise, the Commission's ultimate finding herein of the existence of undue preference of New Orleans and undue prejudice to Galveston not only is unsupported by but is contrary to the evidence of record and the Commission's findings of fact based thereon 147

IX. The Commission having laid down and adopted as the basis for its order in cause No. 12798 a more restricted rule as to circuity than was and is applied by it on the same commodities under the fourth section, where the same limitation as to undue preference exists as in this case, such orders are arbitrary and hence null and void 148

X. In many respects the Commission's evidentiary findings of fact are either unsupported by any evidence or else are contrary to the uncontradicted evidence of record, and hence its action in making such findings is arbitrary and capricious and its orders based thereon are null and void 149

XI. The voluntary maintenance by the appellant carriers of a rate on green coffee, in carloads, from New Orleans, La., to Dallas and Fort Worth, Texas, lower than is contemporaneously in effect from New Orleans to Waco, Texas, but the same as the rate maintained by other lines from the Texas ports to Dallas and Fort Worth, they having no controlling voice in fixing the level of the rates from New Orleans to Waco, a point not reached by their own rails, nor from the Texas ports to either Dallas or Fort Worth, does not as a matter of law result in undue prejudice to Waco or undue preference of either Dallas or Fort Worth 223

XII. The orders of the Commission under review herein contravene the due process clause of the Fifth Amendment to the Constitution of the United States 232

XIII. The maintenance of the gulf ports on a rate parity as to foreign and coastwise traffic does not violate but is strictly in consonance with the requirements of section 500 of the Transportation Act, 1920, and of section 8 of the Merchant Marine Act, 1920, and in holding that the maintenance of such ports on a rate parity is in contravention of the provisions of said statutes, the Commission has placed an erroneous interpretation upon the meaning thereof 253

XIV. When called upon to pass upon the validity vel non of an administrative order of the Interstate Commerce Com-

mission, assailed as being either unsupported by the evidence or contrary thereto, or both, it is not sufficient for the district court to accept as binding upon it the findings and conclusions set out in the report and opinion of the Commission, but it is the affirmative function and duty of the court to examine and review the evidence before the Commission (when made available) to ascertain whether the assailed order was based upon substantial evidence, and if such evidence is not sufficient for that purpose to enjoin the enforcement of the order in question as being void and without legal sanction 256

Concluding Remarks 261

Prayer for Reversal 267

Table of Cases

Page

Advances in Rates, 22 I. C. C. 604 198

Akron &c. R. Co. v. United States, 261 U. S. 184 73

Allgeyer v. Louisiana, 165 U. S. 578 232, 246

American Exp. Co. v. South Dakota, 244 U. S. 617 82

Anchor Coal Co. v. United States, 25 Fed. (2d) 462 71, 115, 119

Ann Arbor R. Co. v. United States, 281 U. S. 658 71, 72

Arkansas Jobbers & Mfgs. Ass'n v. Director General, 59 I. C. C. 662 98

Ashland Fire Brick Co. v. S. Ry. Co., 22 I. C. C. 115 16, 91, 94, 95

Armour Pkg. Co. v. United States, 209 U. S. 56 145, 146

Atchison &c. Ry. Co. v. Int. Com. Com., 190 Fed. 591 76, 115, 122

Atchison &c. Ry. Co. v. United States, 191 Fed. 856 148

Atlantic Coast Line v. N. Car. Corp. Com., 206 U. S. 1 198

Baltimore & O. R. Co. v. United States, 279 U. S. 781 256

Banton v. Belt Line Ry. Corp., 268 U. S. 413 243

Blackstrap Molasses from Louisiana Ports, 171 I. C. C. 591 217

Boston C. of C. v. A. A. R. R. Co., 95 I. C. C. 539 107, 124, 142

Boyd v. United States, 116 U. S. 616 251

Brown v. Gay, 76 Tex. 444 51

Buchanan v. Warley, 245 U. S. 60 232, 239

Cement in Trunk-line Territory, 174 I. C. C. 224 113

Central R. R. Co. v. United States, 257 U. S. 247 ..... 37, 74, 82, 94, 97, 99, 101, 103, 104, 266

Chesapeake & O. R. Co. v. Martin, 283 U. S. 209 ..... 73, 208

Chicago, I. & L. R. Co. v. United States, 270 U. S. 287 ..... 37, 101, 147, 149

Chicago Junction Case, 264 U. S. 258 ..... 73, 208

Chicago &c. R. Co. v. Minnesota, 134 U. S. 418 ..... 232, 237

Cleveland &c. R. Co. v. United States, 275 U. S. 404 256

Consolidated Southwestern Cases, 123 I. C. C. 203 ..... 199, 228

Control of Gulf Coast Lines, 94 I. C. C. 191 86

Control of International-Great Northern, 90 I. C. C. 262 86

Dayton-Goose Creek R. Co. v. United States, 263 U. S. 456 79

Deciduous Fruit Case, 281 U. S. 658 ..... 71, 72

Duplex Ptg. Co. v. Deering, 254 U. S. 443 249

East Tenn. &c. Co. v. Int. Com. Com., 181 U. S. 648 ..... 82, 124, 136, 139

Ellis v. Int. Com. Com., 237 U. S. 434 ..... 115, 119

Export and Import Rates, 169 I. C. C. 13 ..... 109, 134, 191

Florida East Coast R. Co. v. United States, 234 U. S. 167 ..... 72, 200

Gibbons v. Ogden, 9 Wheat 1 145

Grain and Grain Products, 164 I. C. C. 619 165

Hocking Valley Ry. Co. v. Lackawana Coal & L. Co., 224 Fed. 930 59

Houston C. of C. v. Railroad Commission, 19 S. W. (2d) 583 165

Import Rate Case, 162 U. S. 197 ..... 11, 72, 107, 113, 123, 126, 130, 135, 138, 141, 147, 149, 204, 261

Intermountain Rate Cases, 234 U. S. 476 ..... 124, 136, 148

International Shoe Co. v. Federal Trade Comm., 280 U. S. 291 ..... 73, 208, 213

Int. Com. Com. v. Alabama Mid. R. Co., 74 Fed. 715 ..... 76, 77

Int. Com. Com. v. Alabama Mid. R. Co., 168 U. S. 144 ..... 76, 77, 123, 135, 138

Int. Com. Com. v. Baltimore & O. R. Co., 145 U. S. 263 ..... 135, 138

Int. Com. Com. v. Baltimore & O. R. Co., 225 U. S. 326 ..... 124, 137

Int. Com. Com. v. Chicago G. W. R. Co., 141 Fed. 1003 ..... 124, 138

Int. Com. Com. v. Chicago G. W. R. Co., 209 U. S. 108 ..... 76, 124, 140
Int. Com. Com. v. Clyde S. S. Co., 93 Fed. 83 ..... 124, 138
Int. Com. Com. v. Diffenbaugh, 222 U. S. 42 ..... 82, 115, 118
Int. Com. Com. v. Illinois Cent. R. Co., 215 U. S. 452 ..... 71, 72, 73
Int. Com. Com. v. Louisville & N. R. Co., 190 U. S. 273 ..... 56, 124, 141, 232, 239
Int. Com. Com. v. Louisville & N. R. Co., 227 U. S. 88 ..... 72, 74, 76
Int. Com. Com. v. Northern P. R. Co., 216 U. S. 538 ..... 72, 232
Int. Com. Com. v. Union P. R. Co., 222 U. S. 541 ..... 71, 72, 73, 200, 204, 256, 257
Kemble v. Boston & A. R. R. Co., 8 I. C. C. 110 59
Lawrence v. St. Louis-S. F. R. Co., 274 U. S. 588 256
Liggett Co. v. Baldridge, 278 U. S. 105 ..... 232, 248
Louisville & N. R. Co. v. Behlmer, 175 U. S. 648 ..... 124, 135, 147, 154
Maritime Asso., Boston C. of C., v. A. A. R. R. Co., 95 I. C. C. 539 ..... 107, 124, 142
Memphis-Southwestern Investigation, 55 I. C. C. 515 178
Minneapolis &c. R. Co. v. Peoria & P. U. R. Co., 270 U. S. 580 83
Nectow v. Cambridge, 277 U. S. 183 ..... 232, 241
New York Board of Trade & Transp. v. Pennsylvania R. Co., 3 I. C. C. 417 113
Northern P. R. Co. v. North Dakota, 236 U. S. 585 ..... 232, 241
Oklahoma Corp. Comm. v. Ry. Co., 38 I. C. C. 33 170
Oklahoma Corp. Comm. v. A. & S. Ry. Co., 98 I. C. C. 183 176
Oklahoma Corp. Comm. v. A. & S. Ry. Co., 101 I. C. C. 116 176
Panama S. S. Co. v. Vargas, 281 U. S. 670 257
Passenger Scrip Case, 263 U. S. 603 ..... 71, 72, 73
Penn Ref. Co. v. Western N. Y. & P. R. Co., 208 U. S. 208 82
Pennsylvania v. Wheeling & B. Bridge Co., 18 How. 421 145
Philadelphia & R. Ry. Co. v. United States, 240 U. S. 334 226
Port Arthur C. of C. & Shipping v. R. Co., 169 I. C. C. 753 165
Rate Structure Investigation, Cotton, 165 I. C. C. 595 165
Refrigeration Charges on Fruits, Etc., from the South, 151 I. C. C. 649 213

St. Louis S. W. Ry. v. United States, 245 U. S. 136 ..... 87, 96, 97
Skinner & Eddy Corp. v. United States, 249 U. S. 557 ..... 76, 78, 124, 136, 244
Slaughter-House Cases, 16 Wall 36 250
Sou. Pac. Co. v. Int. Com. Com., 200 U. S. 536 ..... 124, 136
Sou. Pac. Co. v. Int. Com. Com., 219 U. S. 433 ..... 71, 72, 76, 115
State of Washington v. Roberge, 278 U. S. 116 ..... 232, 241
Terrace v. Thompson, 263 U. S. 197 ..... 232, 240
Texas & P. Ry. Co. v. Int. Com. Com., 162 U. S. 197— 11, 72, 107, 113, 123, 126, 130, 135, 138, 141, 147, 149, 204, 261
Texas & P. Ry. Co. v. Scott, 77 Fed. 726 48
Texas & Pacific Readjustment, 86 I. C. C. 808 ..... 52, 87
Truax v. Corrigan, 257 U. S. 312 249
United States v. Abilene & S. R. Co., 265 U. S. 274 73
United States v. Atchison &c Ry. Co., 234 U. S. 476 ..... 124, 136, 148
United States v. Chicago &c R. Co., 282 U. S. 311 ..... 232, 249
United States v. Illinois Cent. R. Co., 263 U. S. 515 ..... 37, 76, 79, 82, 101, 107, 123, 153
United States v. Missouri P. R. Co., 278 U. S. 269 ..... 76, 79
United States v. N. Y. C. R. Co., 263 U. S. 603 ..... 71, 72, 73
United States v. Pennsylvania R. Co., 266 U. S. 191 83
Virginian R. Co. v. United States, 272 U. S. 658 ..... 256, 259
Washington v. Roberge, 278 U. S. 116 ..... 232, 241
Western Passenger Fares, 37 I. C. C. 1 ..... 76, 79
Western Rate Advance Case, 20 I. C. C. 307 197
Willamette Valley case, 219 U. S. 433 ..... 71, 72, 76, 115
Wisconsin R. R. Comm. v. Maxcy, 281 U. S. 82 ..... 257, 259
Wyoming R. R. Co. v. United States, 263 U. S. 515 102
York Mfrs. Asso. v. P. R. R. Co., 107 I. C. C. 219 98
United States Constitution, Article I, § 9 145
United States Constitution, Fifth Amendment 250
Interstate Commerce Act, § 1 93
Interstate Commerce Act, § 3 ..... 7, 80, 81, 137

Interstate Commerce Act, § 6(13) 59
Interstate Commerce Act, § 15(4) 79
Merchant Marine Act, 1920, § 8 253
Transportation Act, 1920, § 500 253
Hoch-Smith Resolution 124, 262
Equity Rule No. 70½ 257, 260
Bentham's Theory of Legislation 232, 237
Judson on Interstate Commerce 124, 138

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1931

No. 24

The Port Rate-Relation Case

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA & ARKANSAS RAILWAY COMPANY, LOUISIANA RAILWAY & NAVIGATION COMPANY, LOUISIANA RAILWAY & NAVIGATION COMPANY OF TEXAS (NOW LOUISIANA, ARKANSAS & TEXAS RAILWAY COMPANY), THE STATE OF LOUISIANA, LOUISIANA PUBLIC SERVICE COMMISSION, THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS, NEW ORLEANS JOINT TRAFFIC BUREAU, BOARD OF TRADE OF KANSAS CITY, MO., GRAIN DEALERS ASSOCIATION OF OKLAHOMA, OKLAHOMA MILLERS ASSOCIATION, ST. JOSEPH GRAIN EXCHANGE, OMAHA GRAIN EXCHANGE, ATCHISON BOARD OF TRADE, TERRELL CHAMBER OF COMMERCE, AND MONROE TRAFFIC BUREAU,

Appellants.

VS.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE STATE OF TEXAS, GALVESTON CHAMBER OF COMMERCE, GALVESTON COTTON EXCHANGE AND BOARD OF TRADE, HOUSTON CHAMBER OF COMMERCE, NAVIGATION & CANAL COMMISSIONERS OF HARRIS COUNTY—HOUSTON SHIP CHANNEL NAVIGATION DISTRICT OF HARRIS COUNTY, TEXAS, BEAUMONT CHAMBER OF COMMERCE, BEAUMONT DOCK & WHARF COMMISSION, PORT ARTHUR CHAMBER OF COMMERCE & SHIPPING, ORANGE CHAMBER OF COMMERCE, TEXAS CITY BOARD OF TRADE, COOPER GROCERY COMPANY, SHEAR COFFEE COMPANY, WACO COFFEE COMPANY, INC., WACO CHAMBER OF COMMERCE, HUTCHINSON BOARD OF TRADE, FORT WORTH FREIGHT BUREAU, FORT WORTH CHAMBER OF COMMERCE, HUNTER MILLING COMPANY, OKLAHOMA COTTONSEED CRUSHERS' ASSOCIATION, KANSAS MILLING COMPANY, WILLIAM KELLY MILLING COMPANY, GOERZ FLOUR MILLS COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, MISSOURI-KANSAS-TEXAS RAILROAD COMPANY OF TEX-

AS, THE TRINITY AND BRAZOS VALLEY RAILWAY COMPANY, JOHN A. HULEN, RECEIVER (NOW BURLINGTON-ROCK ISLAND RAILWAY COMPANY), GULF, COLORADO AND SANTA FE RAILWAY COMPANY, PANHANDLE AND SANTA FE RAILWAY COMPANY, AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Appellees.

Appeal from the United States District Court for the Southern District of Texas, Galveston Division.

BRIEF ON BEHALF OF THE TEXAS AND PACIFIC RAILWAY COMPANY, APPELLANT

STATEMENT

1. References to Official Reports of Decisions of the Lower Court and of the Commission

The official report of the majority opinion of the District Court in this cause appears in 42 Fed. (2d), at pages 281 to 286, followed by the dissenting opinion of Circuit Judge Foster, at pages 286-87. These opinions appear in the printed record at pages 3571-81 and pages 3581-82, respectively, and the final decree of dismissal will be found at pages 3582-83 of the printed record.

The three opinions of the Interstate Commerce Commission (hereinafter referred to as the Commission) upon which were based the respective orders under review herein were handed down on June 24, 1925, June 29, 1927, and December 23, 1929, and are respectively

reported under the title of I. C. C. Docket No. 12798, *Galveston Commercial Association* v. *Galveston, Harrisburg & San Antonio Railway Company et al.*, 100 Inters. Com. Rep. 110 (R. 3346-66), 128 Inters. Com. Rep. 349 (R. 3367-3436), and 160 Inters. Com. Rep. 345 (R. 3437-59). In the last of these opinions the Commission additionally treated the issues and evidence involved in I. C. C. Docket No. 20685, entitled *Cooper Grocery Company et al.* v. *Angelina & Neches River Railway Company et al.*, the order in which is likewise under review herein. The various orders of the Commission whose validity is attacked in this proceeding appear of record as follows: in No. 12798, R. 70-75, R. 76-84, R. 87-92; in No. 20685, R. 93-94. For convenience, we shall hereinafter designate these as the 1925, 1927, or 1929 reports and/or orders of the Commission, as the case may be.

2a. Proceedings before the Commission (1921-25)

The original complaint in No. 12798 was filed with the Commission by the Galveston Commercial Association (now the Galveston Chamber of Commerce) on May 9, 1921 (R. 3300-12). Such complaint primarily assailed as being unlawful the failure of the defendant carriers to "absorb" or pay out of their published tariff rail rates on shipments of traffic in export, import, and coastwise

commerce to and from the port of Galveston, Texas, certain charges assessed for terminal services performed at said port of Galveston, particularly charges made for switching to and from the wharves and wharfage charges assessed on traffic moving over the wharves. A hearing on this issue (which is not involved in the instant court proceeding) was held in October, 1921, but later a satisfactory adjustment with reference thereto was arrived at by the complainant and the interested defendants (R. 287-89). A certified copy of the transcript of testimony at this hearing was sent up as an original exhibit.

Some difference of opinion having arisen as to the precise scope of the issues raised by the original complaint, following the close of the aforesaid hearing complainant filed with the Commission on October 26, 1921, its amended complaint (R. 3312-25), wherein it undertook to set forth in greater detail the issues relating to the relation as between the respective ports of Galveston and New Orleans of the line-haul rail rates* applying to and from those ports for the inland transportation of shipments of freight passing through same in export, import, and coastwise movement, as the case may be.

Thereupon, a motion to make complainant's amended complaint more definite and certain was filed with the

*Throughout this brief, where reference is made to rates, "differentials," and differences in rates, they will be stated in cents per 100 pounds.

Commission by the defendants, such motion bearing date as of November 9, 1921 (R. 3342-44), following which complainant filed with the Commission its amended complaint (corrected), dated December 14, 1921 (R. 3326-41).

In such amended complaint (corrected) it was alleged in substance (so far as is here material) on behalf of the commercial and shipping interests of Galveston, Texas, as stated in the second paragraph of the Commission's 1925 report (R. 3348), that the rail rates for the inland transportation of numerous specified commodities* moving through the ports in export, import, and coastwise traffic, in carloads, between all points in western classification territory and Illinois, on the one hand, and the port of Galveston, on the other, were and are unreasonable, and that the relation of the rail rates

*In principle, the complaint covered all commodities moving through the ports in foreign and/or coastwise commerce, but the following commodities were specifically listed therein: cottonseed and peanut cake, meal, and oil, and lumber and forest products from Texas, Oklahoma, Arkansas, and Louisiana west of the Mississippi River, referred to as western Louisiana; cement and cement plaster from Texas, Oklahoma, and Kansas; rice from Arkansas and western Louisiana; cotton-factory products from Arkansas and Texas; asphalt, petroleum, and petroleum products from Texas, Oklahoma, Kansas, Arkansas, and western Louisiana; rosin and turpentine from western Louisiana and Texas; packing-house products from Oklahoma and Texas; salt from western Louisiana; grain and grain products from Oklahoma, Kansas, and other western states, and from points in Texas on the Texas & Pacific, the Kansas City, Mexico & Orient, the Gulf, Texas & Western, the Roscoe, Snyder & Pacific, and the Abilene & Southern; burlap bagging, cotton-bale covering, cotton-bale ties and buckles, and bags (burlap, jute, gunny, cotton, clayed cotton, and cotton lined) to Arkansas, Kansas, Oklahoma, Texas, and western Louisiana; and coffee to Texas, Oklahoma, Arkansas, Kansas, and other western states. Cotton, cotton linters, and smelter products were additionally listed, but the complaint as to those articles was withdrawn at the hearing.

from and to this origin and destination territory to and from Galveston, on the one hand, and to and from Texas City, Houston, Beaumont, Port Arthur and Orange, Texas, New Orleans, La., and Mobile, Ala., on the other, was and is unduly prejudicial to the port of Galveston and unduly preferential of the other ports mentioned.

This appellant, jointly with its then receivers, J. L. Lancaster and Charles L. Wallace, and The Denison and Pacific Suburban Railway Company and The Weatherford, Mineral Wells and Northwestern Railway Company, thereupon filed its answer to the aforesaid amended complaint (corrected). In its said answer (R. 3345-46), this appellant admitted that it was a common carrier engaged, actively or potentially, in the transportation of property by railroad, as alleged, and that as such common carrier it was subject to the Act to Regulate Commerce and acts amendatory thereof or supplementary thereto, but otherwise expressly denied each and every other allegation of fact in said complaint contained, and in particular it was denied that petitioner had violated or was violating the Act to Regulate Commerce, as amended, or that complainant had been in any wise damaged or was entitled to the relief prayed for, or to any other relief.

A hearing on such amended complaint (corrected) was held before Arthur R. Mackley, *Esq.*, one of the Commission's examiners, in March and April, 1922 (R. 289-

858), at which numerous interested parties (as listed at the beginning of the Commission's 1925 report—R. 3347), including the port and commercial interests at Houston, Texas City, Beaumont, Orange, and Port Arthur, Texas, which joined hands with the complainant (R. 3348), appeared by intervention. At this hearing the allegations of unreasonableness were withdrawn, as were the charges of undue preference of Port Arthur and the other Texas gulf ports (R. 3348). The only issue thus left was that of undue preference and prejudice arising under paragraph (1) of § 3 of the Interstate Commerce Act between the Texas ports, including Galveston, on the one hand, and the Louisiana ports, principally New Orleans, on the other.

Following the taking of voluminous testimony, including more than 196 exhibits (certified copies whereof were sent up as original exhibits) and the filing of briefs, the aforesaid Examiner prepared and presented to the Commission his proposed report (R. 47-69), wherein he recommended that the complaint be dismissed. This proposed report (hereinafter termed the Mackley report) was duly served upon the parties, and exceptions thereto were filed by the complainant and parties supporting the complaint. Replies to such exceptions were duly filed, and on June 17, 1924 (R. 3346, 3348), the case was submitted upon oral argument before Division 2 of the Commission, consisting of Commissioners Aitchison, Esch, and Campbell.

Generally speaking, except for certain changes in verbiage, largely in the interest of accuracy of expression, the statement of the case and the findings of fact in the Commission's 1925 report conform substantially to the statement and findings in the Mackley report (R. 47-64), but the latter portion of the Commission's said report (R. 3360-63) differs materially from that part of the Mackley report, and the Commission's conclusions were contrary to the Examiner's recommendation of dismissal. The Commission (Division 2) concluded, and by its order of June 24, 1925 (R. 70-75), required, that the carriers defendant in said cause No. 12798 should apply the rail factors of the through rates applying on export, import, and coastwise business moving through the port of Galveston on a lower basis than the rail factors of the corresponding through export, import, and coastwise rates contemporaneously maintained on such traffic moving through the port of New Orleans to the extent of certain minimum differences or "differentials" therein specified* as to all points from which

*On grain and grain products from southern Kansas, 3 cents; from Oklahoma, 4 cents; from points in Texas on the lines of the Texas & Pacific, the Kansas City, Mexico & Orient, the Gulf, Texas & Western, the Roscoe, Snyder & Pacific, and the Abilene & Southern, 5 cents. On cottonseed and peanut cake and meal from Oklahoma, 4 cents; from Texas, 6 cents. On cottonseed and peanut oil from Oklahoma, 5 cents; from Texas, 7 cents. On petroleum, petroleum products, and asphalt from southern Kansas, 2 cents; from Oklahoma, 3 cents; from Texas, except the Houston-Beaumont-Port Arthur groups, 4 cents; from Beaumont-Port Arthur group, 6 cents. On packing-house products and related articles, except soap, from Oklahoma, 6 cents; from Texas, 9 cents. On soap from Oklahoma, 5 cents; from Texas, 7 cents. On cotton-factory products and related articles from Texas, 12 cents. On turpentine and related articles from south-

the distance to New Orleans exceeded the distance to Galveston by more than 100 miles. (100 I. C. C. 123).

Before the rates published by the defendant carriers in compliance with such order of the Commission became effective, however, upon petitions filed by The Texas and Pacific Railway Company and others (R. 3372, 3402) for a reconsideration and rehearing of its said findings and order, the Commission reopened said cause No. 12798 for further hearing (R. 3367), and later, in its Investigation & Suspension Docket No. 2560, entered an order (R. 3372) suspending the operation and effect of the rates and schedules so published, and thereupon entered into an investigation of the reasonableness and propriety thereof.

2b. Proceedings Before the Commission (1926-27)

Beginning on February 3, 1926, and continuing until March 20, 1926 (R. 859-3017), a series of further hearings were held in cause No. 12798 before Irving L. Koch, *Esq.*, at New Orleans, La., Galveston and Dallas, Texas, Tulsa, Okla., and Kansas City, Mo. (R. 859, 1625, 2119,

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western Louisiana, as defined in the report, 3 cents; from Texas, 6 cents. On rosin from southwestern Louisiana, as defined in the report, 2 cents. On lumber and forest products taking the same rates from southwestern Louisiana, as defined in the report, 2 cents. On rice and rice products from southwestern Louisiana, as defined in the report, 3 cents. On burlap bagging, cotton-bale covering, and cotton-bale ties and buckles to southwestern Louisiana, as defined in the report, 5 cents; to Texas, 8 cents. On burlap, bags (burlap, jute, gunny, cotton, clayed cotton, and cotton lined), and related articles to southwestern Louisiana, as defined in the report, 5 cents; to Oklahoma, 4 cents. On green coffee to Texas, 9 cents.

2440, and 2636), and at the same time hearings were held in said Investigation & Suspension Docket No. 2560 and in cause No. 20685, a complaint filed by the North Texas Petroleum Traffic Bureau. The issues in the latter proceedings are only indirectly related to this proceeding, and the Commission's orders therein are not herein under review. At these hearings the testimony given by the witnesses was supported by 543 numbered exhibits, together with several unnumbered exhibits subsequently received and filed. (Certified copies of these documents were sent up as original exhibits.)

At this further hearing many additional parties (as listed at the beginning of the Commission's 1927 report —R. 3368-71) appeared by intervention, and following the filing and service of a proposed report by said Examiner (hereinafter termed the first Koch report—R. 3467-3548) the case was submitted on exceptions to the entire Commission on December 10, 1926 (R. 3367). Thereafter, on June 29, 1927, with Commissioners Hall and Woodlock dissenting, with Commissioners Campbell, McManamy, and Taylor concurring in part, all by separate written opinions, and with Commissioner Brainerd taking no part in the decision, the Commission, acting as a whole, handed down its 1927 report* and order in said cause No. 12798 (R. 76-84, 3367-3427).

*To a large extent this report of the Commission is the same as the first Koch report, subject to more or less minor deviations therefrom, again for the purpose of accuracy and clarity of state-

In this 1927 report, the Commission in principle reaffirmed the prior order of its Division 2, although on some of the principal commodities in issue (other than petroleum and petroleum products—R. 3415,—as to which it was declared that a parity of rates does not result in substantial injury to the Texas ports, and on which no differences or "differentials" in the rail rates to the respective ports were prescribed) the amounts of the minimum differences or "differentials" prescribed in its 1925 order were decreased (R. 3416-18),

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ment, but in several important, and we believe significant, features material deletions from or alterations in the Examiner's report were made before its adoption as the report of the Commission.

Thus, the paragraph in his proposed report (R. 3503) wherein the Examiner cites **Texas & P. Ry. Co. v. Interstate Commerce Commission**, 162 U. S. 197, and states that "Neither the Commission nor the carrier may lawfully adjust rates for the purpose of equalizing natural advantages," was entirely rewritten in the Commission's report, three paragraphs being substituted therefor (R. 3404-5), and a citation to a decision of the Commission containing a holding contrary to that of this Court in the case cited by the Examiner was substituted for the latter.

Somewhat similarly, several paragraphs in the Examiner's report (R. 3514-15, 3517-19), wherein he comments upon the responsibility and practice of the Commission under §§ 4 and 15a of the Interstate Commerce Act, were deleted almost in their entirety before the Commission's adoption of such proposed report, and in the same connection the Commission rejected the Examiner's recommendation (R. 3521-22) that the rate relation which the Commission should prescribe between the ports of Galveston and New Orleans, respectively, should be based upon the same percentages of circuity that had been held by the Commission to be proper in its grants of relief to the southwestern carriers from the provisions of the fourth section, rather than upon the much narrower limitation of 25 per cent excess distance sought by complainant and the other Texas ports.

A third significant deletion made by the Commission from the first Koch report is three paragraphs (R. 3510-13), in which the Examiner (1) reviews certain evidence of this appellant relating to empty-car movement on its line to meet loading requirements in Louisiana, (2) compares the earnings of this appellant under its equalized rates to New Orleans with the earnings of other carriers under rates which had received the Commission's approval, and (3) recites the excess service rendered by competitors of this appellant (some of which were then and are still supporting this complaint) on shipments of grain and petroleum oil to the Louisiana ports which moved over circuitous routes.

and in the case of certain of the commodities, including grain and grain products, an adjustment somewhat different from that on the remaining commodities was prescribed, besides which the area of the territory as to which such "differentials" were prescribed to apply was in some measure reduced.* (128 I. C. C. 389-90.)

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*The minimum differentials so prescribed are as follows:

On grain and grain products from Kansas on, south, and east of the line of the Rock Island from and including Liberal to but not including Hutchinson, and from Oklahoma and Texas on and north of the lines of the Rock Island from and including Oklahoma City through Clinton, Okla., and Amarillo, Tex., to the Texas-New Mexico state line, 1 cent; from Oklahoma and Texas south of the Rock Island lines just described, 2 cents.

On asphalt from southern Kansas north of the Rock Island lines above described, 1 cent; from Kansas, Oklahoma, and Texas on and south of that line and on and north of the Rock Island lines in Oklahoma and Texas above described, 2 cents; from Oklahoma and Texas south of those lines, except the Houston-Beaumont-Port Arthur groups, 3 cents; from the Beaumont-Port Arthur group, 6 cents.

On bagging (cotton-bale covering), cotton-bale ties, and buckles, to Oklahoma and Texas on and north of the aforesaid Rock Island lines, 3 cents; to Oklahoma and Texas south of those lines, 6 cents; to southwestern Louisiana, 5 cents.

On bags (burlap, jute, gunny, cotton, clayed cotton, and cotton lined) and related articles to Oklahoma on and north of the aforesaid Rock Island lines to the Oklahoma-Texas state line, 3 cents; to Oklahoma south of that line, 6 cents; to southwestern Louisiana, 5 cents.

On green coffee to Texas, 9 cents.

On cotton-factory products and related articles from Texas, 12 cents.

On cottonseed and peanut cake and meal from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 3 cents; from Oklahoma and Texas south of those lines, 5 cents.

On cottonseed and peanut oil from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 4 cents; from Oklahoma and Texas south of those lines, 6 cents.

On lumber and forest products taking the same rates from southwestern Louisiana, 2 cents.

On packing-house products and related articles, except soap, from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 5 cents; from Oklahoma and Texas south of those lines, 8 cents.

On rice and rice products from southwestern Louisiana, 3 cents.

On rosin from southwestern Louisiana, 2 cents.

On soap from Oklahoma and Texas on and north of the aforesaid Rock Island lines, 4 cents; from Oklahoma and Texas south of those lines, 6 cents.

On turpentine and related articles from southwestern Louisiana, 3 cents; from Texas, 6 cents.

Exhibit B-1 (R. 3020) is a map (reproduced in an accompanying volume of exhibits) on which are drawn lines that clearly delineate the eastern boundary of the Kansas, Oklahoma, and Texas territory as to which the differential rate adjustment was so prescribed to apply. This is the line "here drawn across the map," to follow the vehement dissent of former Commissioner Hall (R. 3429), from one side of which "a man may ship at the same rate through Galveston or New Orleans," but from the other side of which "an obstacle of our own devising will bar the route through one port and leave him no choice except at a prohibitive differential in rate." And to this the Commissioner added: "His distance from New Orleans may be no greater than that of his competitor, who has a choice between two ports at the same rate, but if he selects New Orleans he must pay the higher rate." (See, as to this, pages 220-23, infra.)

The territorial circumscription alluded to above arose from the fact that the requirement as to applying the differentials was so modified as to read that they should be applied only as to points from which the distance to New Orleans exceeded that to Galveston by approximately 25 per cent (R. 3416), and by reason of the further fact that the formula for computing distances was changed (R. 3362, 3419).

Furthermore, on a finding that such carriers were not subject to a charge of undue preference and preju-

dice under § 3 of the Interstate Commerce Act (R. 3406), the Commission specifically exempted from the requirements of its 1927 order (R. 80, 3416) points on the lines of The Texas and Pacific Railway Company and the Louisiana Railway & Navigation Company of Texas (now the Louisiana, Arkansas & Texas Railway Company). The effect of this exemption was to leave this appellant and the present Louisiana & Arkansas system (as well as competing carriers in so far as permitted under fourth-section limitations or by exemption therefrom) free to continue their maintenance of New Orleans on a rate parity with the Texas ports as to foreign and coastwise traffic shipped to and from points on the respective lines of those two carriers.

Export, import, and coastwise rates bearing the differential relationships thus prescribed in the Commission's 1927 order were published in due course and became effective December 12, 1927, except as to points on the Texas & Pacific and on the present Louisiana, Arkansas & Texas. So far as is disclosed by the record (*e. g.*, R. 3109), subject to the foregoing exceptions, the Commission's order was complied with almost altogether by increasing the rates to and from New Orleans so that they would exceed the rates contemporaneously maintained to and from Galveston.

2c. Proceedings Before the Commission (1928-29)

In response to various further petitions for modification or revision of its 1927 order, by its orders of April 2 and July 2, 1928 (R. 3437-38), the Commission again opened its cause No. 12798 for further hearing "upon the issues whether (1) The Texas and Pacific Railway Company is controlled by the Missouri Pacific Railway Company; (2) The Texas and Pacific Railway Company, the Louisiana Railway & Navigation Company, and the Louisiana Railway & Navigation Company of Texas should be exempted from the finding of undue prejudice with respect to other defendants made on June 29, 1927; and (3) the Weatherford, Mineral Wells and Northwestern, Denison and Pacific Suburban, Cisco & Northeastern, Abilene & Southern, and Pecos Valley Southern should be exempted from the finding of undue prejudice made with respect to these carriers on June 29, 1927.

Such further hearing was held on January 9-12, 1929 (R. 3019-3296), again before Examiner Koch, at which there were received 116 numbered exhibits, besides several others filed after the close of the hearing (certified copies whereof were sent up as original exhibits), and in due course he prepared and served another proposed report (hereinafter termed the second Koch report—R. 3549-67). On November 13, 1929 (R. 3438), the cause was submitted on exceptions to the entire Commission a second time, following which the Commission, once more

acting by a majority (R. 3458-59), with Commissioners Meyer, Woodlock, and Porter dissenting (R. 3458-59), and with Commissioner Brainerd expressing doubt (R. 3458), especially with respect to shipments of grain for export, as to the proof of facts sufficient in law to support the Commission's prior finding of the existence of undue prejudice as to the Texas ports and undue advantage as to New Orleans, by its further report* and order in cause No. 12798 of December 23, 1929 (R. 87-92), rescinded that part of its 1927 order which exempted from the requirements thereof points on the lines of The Texas and Pacific Railway Company and the Louisiana Railway & Navigation Company of Texas, as aforesaid, and thereupon directed and required that, effective March 21, 1930, the same minimum differences or "differentials" in the export, import and coastwise rates applying between the points on such lines lying within the "25 per cent" territory in Texas and the respective ports of New Orleans and Galveston be established and maintained as all carriers defendant therein had previously been ordered and required to maintain as to all other

*This 1929 report of the Commission differs but slightly from the second Koch report. In a few instances (**cf.** R. 3446, 3557; R. 3447, 3558; R. 3449, 3560; R. 3456, 3566) expressions found in the Examiner's report were omitted from that of the Commission, while in other instances the latter reflects a slight amplification of the former. The principal point of difference lies in the revision adopted by the Commission (R. 3452-54) of the two paragraphs in the Examiner's report (R. 3563-65) with reference to the extent to which a carrier may be held responsible for undue preference and prejudice, as enunciated in **Ashland Fire Brick Co. v. S. Ry. Co.**, 22 Inters. Com. Rep. 115, and other cases there reviewed. This feature of the case will constitute one of the topics of discussion in the ensuing argument.

points in this so-called "differential" territory. (160 I. C. C. 359-60.)

By complaint filed with the Commission on February 6, 1928, in its cause No. 20685 by The Cooper Grocery Company, The Shear Coffee Company, and the Waco Coffee Company, each of which is engaged in the business of roasting coffee at Waco, Texas, it is charged that the maintenance by the carriers named as defendants therein, including the carriers by whom these proceedings were instituted, of an import rate of 48.5 cents per 100 pounds on shipments of green coffee, in carloads, from New Orleans, to Dallas and Fort Worth, Texas, points served by The Texas and Pacific Railway, while contemporaneously maintaining on shipments of green coffee, in carloads, from New Orleans to Waco a higher rate of 57.5 cents per 100 pounds (the difference reflecting the minimum "differential" of 9 cents per 100 pounds which the carriers were required to observe in the rate on coffee as between New Orleans and Galveston except as to points on the exempted lines) results in undue preference of coffee roasters located at Dallas and Fort Worth and in undue prejudice to such complainants (R. 3460-65). An answer to said complaint was filed by this appellant (R. 3466) substantially the same as that filed by it in cause No. 12798, as aforesaid.

A hearing on such complaint (an outgrowth of the Commission's 1927 order in the other proceeding) was

held at the same time and place as was the third hearing in cause No. 12798, as aforesaid, at which various parties intervened in the proceeding (R. 3442), and by order entered in said cause No. 20685 under date of December 23, 1929 (R. 93-94), the Commission directed and required the carriers defendant therein, including the appellant carriers in this proceeding, to "cease and desist on or before March 21, 1930, and thereafter to abstain from publishing, demanding, or collecting for the transportation of green coffee, in carloads, from New Orleans, La., to Waco, Tex., a rate which shall exceed the rate contemporaneously maintained and applied on the same commodity from New Orleans to Dallas and Fort Worth, Tex."

Upon the institution of these proceedings in the United States District Court at Galveston, Texas, the Commission postponed from time to time the effective date of its said orders of December 23, 1929 (R. 3604-6), so that same finally became effective on August 19, 1930. Compliance with said 1929 orders of the Commission was effected, as was done with respect to its 1927 orders, by generally increasing the rates to and from New Orleans on the commodities involved rather than by reducing the rates thereon to and from Galveston. In the case of coffee, for example, such rate revision resulted in an increase in the rate on coffee from New Orleans to Dallas and Fort Worth from 48.5 to 57.5 cents per 100 pounds.

3. Proceedings in the Lower Court

On February 11, 1930, this appellant brought this action before a statutory court of three judges in the United States District Court for the Southern District of Texas, Galveston Division, under the provisions of the Urgent Deficiencies Appropriation Act of October 22, 1913, to enjoin, set aside, and annul each of the three orders of the Commission described above in its cause No. 12798, as well as its order in cause No. 20685 of December 23, 1929. The petition asserted the invalidity of said orders of the Commission on the ground that they were in excess of the Commission's powers and were based upon an erroneous conception by the Commission of its powers, that they were not only unsupported by but were contrary to the evidence of record, that they were in violation of the provisions of the Interstate Commerce Act, and in particular the provisions of §§ 3 and 15 (4) thereof, that they constitute a direct preference by a regulation of commerce of the ports of one state (Texas) over those of another (Louisiana), in violation of clause 5 of § 9 of Article I of the Constitution of the United States, and that they operate to deprive said petitioner (this appellant) of its property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States (R. 5-43), all as more fully set out in appellants' Assignment of Errors herein and the following argument.

In particular it was alleged that the requirement in the Commission's aforesaid orders in cause No. 12798 that the rail rates to and from Galveston on the foreign and coastwise traffic involved therein should be less than the rail rates contemporaneously maintained on such traffic to and from New Orleans at least to the extent of the arbitrary amounts prescribed by the Commission on the respective commodities in issue is not supported by but is contrary to the evidence, is contrary to all reasonable and accepted rules for rate making, and is not within the spirit or letter of the Interstate Commerce Act; that it is in violation of the rights of the public and of said petitioner (this appellant), and is against public policy (R. 31). It was additionally alleged that it is manifest from the facts stated in said petition, as also upon the face of its reports and orders in cause No. 12798, that the Commission misconceived the meaning of and misapplied § 500 of the Transportation Act, 1920, and § 8 of the Merchant Marine Act, 1920, and that such misapplication of said sections of said acts would have the effect of unlawfully diverting from petitioner (this appellant) and from the port of New Orleans traffic that otherwise would move through that port over petitioner's line (R. 33).

On March 7, 1930, a corresponding suit was brought in the same court by the Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company,

and the Louisiana Railway & Navigation Company of Texas. The allegations and the relief sought in the petition filed therein (R. 95-138) were substantially identical with those contained in the petition filed therein by this appellant, and by its order of April 2, 1930 (R. 202), the court ordered that the two causes be consolidated and heard together.

Prior to the hearing, numerous parties filed interventions in support of the petitions in said consolidated causes, including the State of Louisiana, the Louisiana Public Service Commission, the Board of Commissioners of the Port of New Orleans, and the New Orleans Joint Traffic Bureau, together with various other intervenors numbered among the appellants in this court. Other parties intervened in opposition to said petitions, including the Interstate Commerce Commission, the State of Texas, Galveston Chamber of Commerce, Houston Chamber of Commerce, The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, the Missouri-Kansas-Texas Railroad Company, the Missouri-Kansas-Texas Railroad Company of Texas, the Trinity & Brazos Valley Railway Company, Jno. A. Hulen, Receiver, and various other parties numbered among the appellees in this court.

Motions to strike certain allegations in the respective bills of the petitioners were filed by the Missouri-Kansas-

Texas Railroad Company et al., and motions to strike certain allegations in the answers filed by the Missouri-Kansas-Texas Railroad Company et al. were likewise filed by the respective petitioners (R. 281, 282, 284), which motions by order of the court entered May 1, 1930, were referred to the trial on the merits, but no further order thereon was entered. On motion suggesting that the name of petitioner Louisiana Railway & Navigation Company of Texas had been changed to Louisiana, Arkansas & Texas Railway Company, and that the name of intervenor Trinity & Brazos Valley Railway Company had been changed to Burlington-Rock Island Railway Company, an order was entered permitting such change of names to be made in this cause (R. 3602).

The consolidated causes were submitted before the aforesaid statutory court, consisting of Circuit Judge Rufus E. Foster, and District Judges Wm. I. Grubb and Joseph C. Hutcheson, on May 1 and 2, 1930 (R. 3570-71), at which time a certified copy of the entire record before the Commission, including a set of the exhibits received by the Commission at and following the respective hearings, together with a certified copy of the proposed reports of the two Examiners, the three reports and orders of the Commission, and certain other documents, were tendered and received in evidence (R. 287, 3296). The aforesaid set of exhibits and other

documentary evidence have been certified to this Court as original exhibits (R. 3568-69).

On June 24, 1930 (R. 3582-83), said court entered its order dismissing the respective petitions in both suits. An appeal to this Court was thereupon duly taken. The trial court did not supplement its opinion by preparing any findings of fact, and similarly did not undertake a review of the evidence upon which the Commission's reports and orders herein under review were based. Throughout the opinion of the court references are made to the opinions rendered by the Commission and numerous excerpts taken therefrom are incorporated in the court's opinion, the court apparently having deemed it sufficient to accept at their face value the various findings and conclusions arrived at by the Commission, as set forth in its respective reports. Neither does the trial court anywhere in its opinion discuss or pass upon the allegations in the bills filed by the respective carriers that the effect of the assailed orders of the Commission is to deprive them of their property without due process of law, and that they are therefore in contravention of the Fifth Amendment to the Constitution of the United States.

4. Finding of Probable Jurisdiction

In accordance with paragraph 1 of Rule 12 of the revised rules of this Court, a statement of the grounds

on which the jurisdiction of this Court is invoked was duly filed, and on March 23, 1931, this Court entered an order finding that probable jurisdiction had been shown (283 U. S. ....., 51 Sup. Ct. Rep. 365).

SPECIFICATION OF ERRORS

Appellants make the following Specification of Errors, being the Assignment of Errors upon which this appeal was taken (R. 3583-96), which Assignment of Errors was adopted by appellants as their statement of the points to be relied upon in this Court (R. 3614):

1. The District Court erred in entering a decree in said consolidated causes refusing to grant the relief prayed for by petitioners in their petitions in the above-entitled consolidated causes and in dismissing said petitions.

2. The District Court erred in failing and refusing to hold that the order of the Interstate Commerce Commission made in cause No. 12798, entitled Galveston Commercial Association v. Galveston, Harrisburg & San Antonio Railway Company et al., on the 24th day of June, 1925, was arbitrary, unreasonable, unlawful, unjust and void, and in violation of the provisions of the Interstate Commerce Act, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

3. The District Court erred in failing and refusing to hold that the order of the Interstate Commerce Commission made in cause No. 12798, entitled Galveston Commercial Association v. Galveston, Harrisburg & San Antonio Railway Company et al., on the 29th day of June, 1927, was arbitrary, unreasonable, unlawful, unjust and void, and in violation of the provisions of the Interstate Commerce Act, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

4. The District Court erred in failing and refusing to hold that the order of the Interstate Commerce Commission made in cause No. 12798, entitled Galveston Commercial Association v. Galveston, Harrisburg & San Antonio Railway Company et al., on the 23rd day of December, 1929, was arbitrary, unreasonable, unlawful, unjust and void, and in violation of the provisions of the Interstate Commerce Act, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

5. The District Court erred in failing and refusing to hold that the order of the Interstate Commerce Commission made in cause No. 20685, entitled Cooper Grocery Company et al. v. Angelina & Neches River Railroad Company et al., on the 23rd day of December, 1929, was arbitrary, unreasonable, unlawful, unjust and void, and in violation of the provisions of the Interstate Com-

merce Act, and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

6. The District Court erred in failing and refusing to hold and find that none of the said above orders of the Interstate Commerce Commission was supported by any substantial evidence and in failing and refusing to find, as a matter of fact, that the evidence in the record established beyond a doubt that the rate adjustment complained of did not make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, and did not subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

7. The District Court erred in failing and refusing to hold that the Commission's orders set forth in the bills of complaint herein, and sought to be annulled and set aside, are unsupported by evidence and invalid.

8. The District Court erred in failing and refusing to hold that the orders set forth in the bills of complaint herein, and sought to be annulled and set aside, were without any evidence to support same and are beyond the powers of the Commission to make.

9. The District Court erred in holding that the orders of the Interstate Commerce Commission set forth in the bills of complaint herein, and sought to be annulled and set aside, were supported by substantial evidence, the evidence in these cases establishing beyond a doubt that the finding of the Commission in said causes Nos. 12798 and 20685 were without substantial evidence to support same and were arbitrary and void. There was no evidence in said causes Nos. 12798 and 20685 before the Commission to show, or tending to show, any undue or unreasonable preference or advantage or any undue prejudice or disadvantage from the rates therein assailed, either to the ports of Texas or the port of New Orleans, and the Court erred in not holding that the said orders of the Commission are without effect and void.

10. The District Court erred in failing and refusing to hold the Commission's said orders void because the Commission had exceeded its powers, had proceeded upon an erroneous theory of law, and its action is manifestly arbitrary and unreasonable and transecnds the authority conferred upon it by law, and the same should have been set aside and annulled by the Court.

11. The District Court erred in failing and refusing to hold the Commission's said orders void, because it affirmatively appears in the record that, in fixing certain differentials as provided for in said orders in favor of the Texas ports as against the port of New Orleans

for the purpose of arbitrarily favoring the Texas
as against the port of New Orleans, is manifestl
the purpose of meeting a situation, to wit, to force
ness through the Texas ports and away from the
of New Orleans, and away from the rails of the ca
petitioners herein; that said orders are not a regul
of rates, but a regulation of industrial conditions u
guise of regulating rates. It is, in its essence, a
lation of industrial conditions through manipulati
rates.

12. The District Court erred in failing and ref
to hold the Commission's said orders void, for the r
that the effect of the Commission's orders is to de
The Texas and Pacific Railway Company and the L
iana & Arkansas Railway Company, the Louisiana
way & Navigation Company, and the Louisiana Ra
& Navigation Company of Texas (now the Louis
Arkansas & Texas Railway Company), of the ecor
use of their properties. The effect of such orde
to prevent The Texas and Pacific Railway Com
Louisiana & Arkansas Railway Company, Loui
Railway & Navigation Company, and Louisiana Ra
& Navigation Company of Texas (now Louisiana
kansas & Texas Railway Company), from particip
in and enjoying the traffic tributary to their line
meeting the actual competition of other rail carrie
this traffic; so that, to this extent, The Texas an

cific Railway Company, Louisiana & Arkansas Railway Company, Louisiana Railway & Navigation Company, and Louisiana Railway & Navigation Company of Texas (now Louisiana, Arkansas & Texas Railway Company), are deprived of their lawful right to use their properties, which is, in effect, depriving them of their properties without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

13. The District Court erred in failing and refusing to hold the Commission's said orders void for the following reasons:

(a) Said orders ignore the element of actual carrier competition.

(b) Said orders are based merely upon differences in distance of rail-haul to and from gulf ports.

(c) Said orders ignore all transportation conditions between inland points and foreign or coastwise points other than mere differences in distance of rail-haul.

(d) Said orders deny rail carriers serving New Orleans the exercise of managerial discretion as to whether they meet carrier competition.

(e) Said orders ignore interests of shippers of export traffic from points in the interior, of shippers and receivers of coastwise traffic, and of receivers of import traffic at interior points; these interests are arbi-

trarily disregarded and subordinated to the interests of the Texas ports and exporters and importers doing business at Texas ports.

(f) Said orders of the Commission were arbitrarily designed to offset commercial disadvantages inherent in the handling of export, import, and coastwise traffic through the Texas ports, and to compel shippers and receivers of freight to use the Texas ports and the lines of carriers serving the Texas ports or else to pay penalties in the form of differentially higher freight rates for transportation over the lines of carriers serving New Orleans.

(g) The facts stated in the various orders of the Commission in the cases out of which the orders grew show no violation of law by carriers serving the port of New Orleans.

(h) The reports of the Commission upon which said orders are based show upon their face that the orders of the Commission were arbitrary and void, as the facts therein stated show that the purpose of the Commission in making said orders was to arbitrarily divert traffic from the lines of the carriers serving the port of New Orleans to the lines of carriers serving the Texas ports.

(i) Neither The Texas and Pacific Railway Company nor the Louisiana & Arkansas Railway Company, the Louisiana Railway & Navigation Company, nor the

Louisiana Railway & Navigation Company of Texas (now the Louisiana, Arkansas & Texas Railway Company), are responsible for rates from points on their lines to Texas ports, and neither The Texas and Pacific Railway Company nor the Louisiana & Arkansas Railway Company, the Louisiana Railway & Navigation Company, the Louisiana Railway & Navigation Company of Texas (now the Louisiana, Arkansas & Texas Railway Company), reach any of the Texas ports over their own rails, and therefore said carriers can not be guilty of a violation of section 3 of the Interstate Commerce Act in maintaining the same rates to New Orleans on foreign and coastwise traffic as are contemporaneously maintained by carriers from the same points of origin to the Texas ports.

(j) The Commission has laid down a rule for general application permitting circuitous routes of rail carriers to meet routes of short-line competing carriers between points of origin and destination throughout southwestern territory, which rule is substantially more liberal than that prescribed in the instant cases. Carrier competition exists as to foreign and coastwise traffic in no less degree between gulf ports and interior points on the lines of rail carriers under section 3 of the Act than exists between points in southwestern territory under section 4 of the Act. The adoption of a different rule without any difference in transportation conditions is arbitrary and void.

14. The District Court erred in failing and refusing to hold the said Commission's orders void, because the effect of said orders is to deprive carrier petitioners of their right to meet the competition of other carriers serving the ports of Texas on export, import, and coastwise business moving through the port of New Orleans, the effect of said orders being to deprive said carrier petitioners of their right to enjoy export, import, and coastwise traffic originating on and destined to points on their lines and on the lines of their connections in competition with other rail carriers serving the same territory and enjoying the same traffic moving through the Texas ports.

15. The District Court erred in failing and refusing to hold said orders void and in holding that the carrier petitioners herein and or connecting lines of railway could be and are guilty of discrimination and undue prejudice under section 3 of the Interstate Commerce Act, even though their lines do not reach both the port of New Orleans and the Texas ports, and in holding that said carrier petitioners herein and or their connections would be and are guilty of discrimination and undue prejudice in maintaining an equality or parity of rates on export, import, and coastwise business moving through the port of New Orleans or the Texas ports, the record in these cases establishing beyond a doubt that said carrier petitioners here and their connections

earned a reasonable profit upon the movement of export, import, and coastwise traffic from and to interior points on their respective lines for the distance provided in said orders, and that no burden was fixed upon other traffic on account of carrier petitioners and/or their connections maintaining such parity or equality of rates as between the Texas ports and the port of New Orleans.

16. The District Court erred in finding in substance that, as the record in the cases before the Commission was voluminous, and as the Commission had been painstaking in taking evidence in said causes, and as the Commission was better qualified to pass upon the question of rates than the Court, the Court would not attempt to substitute its administrative judgment for that of the Commission. Whether the rate in these particular causes is reasonable or unreasonable was not in question, it being conceded by all parties that the rate in itself is a reasonable rate. The only question involved was whether or not a reasonable rate and the same rate to the ports of Texas and the port of New Orleans on export, import, and coastwise business could create and did create or give any undue or unreasonable preference or advantage in favor of the port of New Orleans as against the Texas ports. The record establishes beyond a doubt that the traffic involved, to wit, export, import, and coastwise, does not stop at either the Texas ports or the port of New Orleans, but merely passes through

in order to reach its final destination. It was not necessary for the Court to pass upon the weight of the evidence. It was necessary, however, for the Court to find and say whether or not there was substantial evidence to support the Commission's orders and not to accept the Commission's findings and conclusions as binding upon the Court, regardless of what the evidence established.

The findings of the Commission as to what the evidence discloses lead to but one conclusion, and that is that there was no substantial evidence to support the complaint of undue prejudice and unjust discrimination under section 3 of the Interstate Commerce Act. The evidence, as shown by the reports of the Commission herein, and upon which it bases its orders, shows conclusively that no such discrimination or prejudice existed. The record disclosed beyond a doubt, and the finding of the Commission based upon this evidence is unquestioned, that a parity of rates upon export, import, and coastwise business between the Texas ports and the port of New Orleans has existed for a long period of years; that under a parity of rates the Texas ports have prospered to a much greater degree and have grown to a much greater extent than the port of New Orleans; that the effect of a parity of rates has not inflicted any injury or imposed any disadvantage upon the Texas ports. A prejudice that does no harm, that creates no

injury, but, as the facts in the record show, creates a commercial benefit, is not a violation of section 3 of the Interstate Commerce Act.

The District Court erred, therefore, in not holding that the conclusions of the Commission, based upon the evidence in this record, are not borne out or sustained by the admitted facts as set forth by the Commission in its own reports and supported by the evidence in the record.

17. The District Court erred in holding that the Commission's orders are valid and binding upon the Court, simply because they were made by the Commission, ignoring the facts in the record that the orders are not supported by substantial evidence. The Interstate Commerce Act, which provides that the orders of the Interstate Commerce Commission may be attacked in Court and set aside, carries with it a presumption that, when they are so attacked in Court, the Court has the right and it is made its duty to examine the evidence in the case to see whether or not there was substantial evidence to support the orders of the Commission, and the Court erred in holding, in effect, that it had no right to review this evidence or to examine same in order to find out whether the orders were supported by substantial evidence. On the contrary, it is evident that the Court did not examine the evidence, but adopted

the findings of the Commission as conclusive upon the Court without any investigation whatsoever.

18. The District Court erred in failing and refusing to hold the Commission's said orders void because they were based upon a mistake of law. What Congress sought to prevent by section 3 was not differences between localities in transportation rates, facilities, and privileges, but unjust discrimination between them by the same carrier or carriers; that said orders are void in that the facts in these causes show that petitioners' lines of road reach only the port of New Orleans; that the rates in effect over their lines of road on export, import, and coastwise traffic are the same rates that are carried if the traffic moves through the Texas ports, or, in other words, an equality of rates; that the traffic originates at the same point and ends at the same point whether it moves through the Texas ports or the port of New Orleans, and the rates are admitted to be reasonable. The evidence discloses, and the Commission so finds, that the ocean rates on this traffic are generally the same at each of the gulf ports so that the sum of the rail rates and the ocean rates creates a parity of the through rate via all of the ports. This conclusively establishes the fact that no undue preference or prejudice exists under section 3 of the Act.

19. The District Court erred in holding that the Commission can lawfully deny to carrier petitioners and

their connections the right and opportunity to meet the actual competition of other rail carriers on business originating on their lines or destined to points on their lines on export, import, and coastwise business, thus eliminating all elements of competition.

20. The District Court erred in holding that carrier petitioners, notwithstanding the fact that their rails do not reach Galveston or any of the Texas ports, could be held liable for undue prejudice and in holding that the facts in this case brought said petitioners within the purview of the decisions in *St. Louis Southwestern Railway* v. *United States*, 245 U. S. 136; *Central Railroad* v. *United States*, 257 U. S. 247; *United States* v. *Illinois Central*, 263 U. S. 515; *Chicago, Indianapolis & Louisville* v. *United States*, 270 U. S. 287. To the contrary, all of said decisions show that a different state of facts existed in each of those cases, and they have no bearing upon a state of facts such as is involved in these suits. In the cases at bar, a parity or equality of rates is involved; in each of the cases cited, complaint was based on the fact that a parity or equality of rates or service was not being given, and in case above, 257 U. S. 247, the Court declined to hold that the inequality of service there considered brought about any undue preference or prejudice.

21. The District Court erred, as is evident from its opinion, in holding that the statements made by the Interstate Commerce Commission in its three reports on the orders attacked herein were conclusive upon the Court, and the Court was evidently of the opinion that it had no right to examine the record to ascertain whether or not these reports were borne out by the evidence. It is evident from reading the opinion of the Court that no investigation of the evidence was made by the Court whatsoever, but the Court accepted the statement of the Commission made in these reports as absolutely conclusive upon it, regardless of the fact as to whether or not the conclusions reached by the Commission were supported by substantial evidence.

This being an attack upon the Commission's orders and an attack authorized to be brought under the Interstate Commerce Act, and being in a court of equity, it was the duty of the Court to review the facts as well as the law. It was the duty of the Court to at least examine the record, in order to ascertain whether or not the Commission's reports were based upon substantial evidence. It is evident that the Court made no investigation of the facts of record, but took the findings of the Commission as absolutely conclusive upon the Court, and in this it erred. The entire record of all the facts before the Commission was before the Court, the purpose of requiring the entire record showing that it was

all the evidence before the Commission, was to enable the Court to examine same to ascertain whether or not the orders of the Commission had substantial evidence to support them. It is evident from the opinion of the Court in this case that it made no such examination, but assumed that the reports of the Commission were absolutely conclusive. In this it erred.

22. The District Court erred in holding that the findings of the Commission as shown by their reports supported the orders, when, as a matter of fact and as shown by the record, the findings and reports of the Commission utterly fail to support the orders, in that they fail to show any undue or unreasonable preference or advantage to the port of New Orleans or any undue or unreasonable prejudice or disadvantage to the ports of Texas. On the contrary, the Commission in its findings and reports shows that the ports of Texas have prospered and grown under a parity of rates and to a much greater extent than the port of New Orleans, and the conclusion of the Court is not supported by the facts as found by the Commission, and the Court erred in so holding.

23. The bills of complaint filed herein attacked said orders on the ground that they would not permit carrier petitioners to enjoy export, import, and coastwise traffic tributary to their lines, and to the lines of their connections, for the reason that the purpose and effect

of the orders was to divert all of said traffic to competing railroad lines serving the Texas ports; that the effect to these orders was to deprive carrier petitioners of the use of their property and the enjoyment of same, and said orders violated the Fifth Amendment to the Constitution of the United States, in that they deprive said petitioners of their properties without due process of law. The Court, in its opinion, utterly ignored this complaint and failed to make any finding upon same, and in this the Court erred, as the undisputed facts in the record and the reports and findings of the Commission, as disclosed by the record, show that the intent and effect of these orders will be to divert all or practically all of this traffic from the port of New Orleans to the Texas ports; that these petitioners have no rail lines into the Texas ports and will be deprived of the movement of such traffic originating at and destined to points on their respective lines, and on the lines of their connections.

24. The District Court erred in failing and refusing to find and declare that, as a matter of law, due consideration being given to the water movement beyond the ports of the traffic in issue, the maintenance by the carrier petitioners of the rail rates thereon to and from New Orleans on a parity with the corresponding rates to and from any of the Texas ports, so as to preserve an equality of the through rail and water rates apply-

ing via any of the gulf ports, does not and can not in itself give rise to undue preference or prejudice of any one port or group of ports over another, and that the Interstate Commerce Commission, therefore, exceeded its authority in undertaking to prohibit said carrier petitioners from the continued maintenance of such an equality of the rates.

25 (a) The District Court erred in failing and refusing to find that the orders of the Commission violate that part of clause 5 of section 9 of Article I of the Constitution of the United States reading as follows: "No preference shall be given by any regulation of commerce * * * to the ports of one state over those of another."

(b) The District Court erred in failing and refusing to find that the orders of the Commission violate that part of clause 5 of section 9 of Article I of the Constitution of the United States reading as follows: "Nor shall vessels bound to or from one state be obliged to enter, clear or pay duties in another."

26. The District Court erred in declaring that "since the orders of the Interstate Commission are based upon its findings that the prohibited rates constitute an unjust preference of the Louisiana ports over the Texas ports, it follows that if the order is supported by evidence the order does not give, but in fact prohibits, a preference of the ports of one state over those of another, and that therefore the orders of said Commission

do not contravene section 9 of Article I of the Constitution of the United States." The legal effect of such declaration of the court is that it is within the power of the Congress to determine, by statutory definition, whether it (or said Commission acting as its agent) has transgressed the aforesaid constitutional limitation upon its powers.

Section 9 of Article I of the Constitution prohibits the Congress from giving any preference of the ports of one state over those of another, whereas section 3 of the Interstate Commerce Act declares it to be unlawful for any common carrier subject to said Act to make or give any undue or unreasonable preference or advantage. If the Congress (or said Commission as its agent), in undertaking to correct what it conceives to be an undue preference or prejudice arising from rates established and maintained by the carriers, should transgress the limitations imposed under section 9 of Article I by creating a preference of the ports of one state over those of another, it becomes the duty of the court to determine whether the congressional fiat (or the act of its vicegerent) transcends its constitutional authority before passing to a determination of the subordinate question as to whether the rates of the carriers conform to the requirements of the statute.

27. The District Court erred in not holding that the effect of said orders was to require petitioners to short-

haul themselves in violation of section 15 (4) of the Interstate Commerce Act.

28. The District Court erred in failing and refusing to hold that the Commission's said orders are void for the reason that they are palpably arbitrary and palpably unreasonable; also, unsupported by and contrary to the findings of fact and the evidence in the case; also, contrary to the purposes and provisions of the Interstate Commerce Act, and particularly of section 3 thereof; also, contrary to the public interest; also, in conflict with the due process clause of the Fifth Amendment to the Constitution of the United States; also, contrary to section 9 of Article I of the Constitution of the United States.

It was clearly established by the evidence before the Court and in the reports of the Commission itself that there was no substantial evidence before the Commission to support such orders, and the Court erred in refusing to declare same void because not supported by substantial evidence but were arbitrary.

BRIEF OF ARGUMENT

At the outset of the ensuing discussion, we deem it proper to state that, notwithstanding the size of the printed record in this proceeding, it is by and large in no sense of the word a fact case. Fundamentally, it is the position of the appellants herein that the orders of the Commission under review, as well as the Commission's ultimate finding of undue preference and prejudice, are not only unsupported by but are directly in conflict with its primary or basic findings of fact, and that this Court will not find it necessary, at least to any appreciable extent, to look beyond the primary findings of fact to be found in the respective reports of the Commission. True, in the course of our argument we shall have occasion from time to time to allude to various portions of the evidence (mostly that ignored in the Commission's findings) in order to demonstrate the arbitrary manner in which the legal rights of the carriers appellant herein were trampled down, and in which the case was handled and disposed of by the Commission, but we now wish to emphasize the fact that in so doing we do not ask or expect this Court to weigh or pass upon the merits of conflicting evidence nor to substitute its judgment as to evidentiary facts for that of the Commission.

The Texas and Pacific Railway Company

Prefatory Remarks: Before we proceed to a discussion of the merits of the case, we believe that a brief survey of the organization of The Texas and Pacific Railway Company, and the development and location of its line of railroad, will aid the Court in an understanding of the facts immediately under review and of the issues based thereon. At the outset, it may be well to state that, while a great deal of evidence was presented by other witnesses with respect to the general features of the case, the following witnesses testified immediately concerning its relation thereto:

As to its origin, development, and management, and as to rate and traffic matters generally:—Witnesses J. B. Payne, Vice President—Traffic (R. 894-1006, 3177-79); J. A. Somerville, Vice President—Operation (R. 1006-26, 3179-81); J. A. Lynch, General Freight Agent (R. 711-88, 2974-3001, 3188-3214, 3282); G. A. Ryser, Assistant General Freight Agent (R. 3282-93).

As to operating matters:—Witnesses J. A. Somerville, Vice President—Operation (R. 1006-26, 3179-81); R. G. Waggener, Assistant Engineer (R. 3257-81).

As to financial and accounting matters:—Witnesses A. J. Biard, Auditor (R. 1028-45); J. T. Ehricht (R. 3001-6, 3009, 3168-77); S. B. Cox (R. 3006-8).

Its Origin and Corporate Creation: The Texas and Pacific Railway Company had its inception in an Act of Congress* approved March 3, 1871, under which it was incorporated with authority (§ 1) "to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, from a point at or near Marshall, County of Harrison, State of Texas; thence by the most direct and eligible route, to be determined by said company, near the thirty-second parallel of north latitude, to a point at or near El Paso; thence by the most direct and eligible route, to be selected by said company, through New Mexico and Arizona, to a point on the Rio Colorado, at or near the southeastern boundary of the State of California; thence by the most direct and eligible route to San Diego, California, to ship's channel, in the Bay of San Diego, in the State of California, pursuing in the location thereof, as near as may be, the thirty-second parallel of north latitude" (R. 896-97).

By § 4 of said act of March 3, 1871, it was provided that the Texas Pacific Railroad Company "shall have power and lawful authority to purchase the stock, land grants, franchises, and appurtenances of, and consolidate on such terms as may be agreed upon between the

*16 Stat. L. 573. By supplemental act of May 2, 1872 (17 Stat. L. 59), the name of the corporation was changed to The Texas and Pacific Railway Company, under which name it has since continued to exist (R. 897). Note: A copy of the articles of incorporation of this appellant, as well as of its by-laws, was filed with the Commission as an unnumbered exhibit after the close of the 1929 hearings (R. 3244), and is on file herein as one of the original exhibits.

parties, with any railroad company or companies heretofore chartered by congressional, State, or territorial authority, on the route prescribed in the first section of this act." Also, in § 19 of said act it is stated that the Texas Pacific Railroad Company "shall be, and it is hereby declared to be, a military and post road; and for the purpose of insuring the carrying [of] the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor any law of any State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard." Further provision is made in the same section for giving the government the preference at all times in the use of the road for the aforesaid postal, military, and other governmental services (R. 897).

Thus, as was testified by Vice President Payne, by the direction of the Congress of the United States was the geographical location of this road fixed as an east-and-west line through the northern portion of Texas, as was also its status as a "military and post road," with authority to work out its completion through the absorption of such other railroad properties as might be necessary to its permanent existence (R. 897-98).

On March 21, 1872, by a deed of consolidation from the Southern Pacific Railway Company—which corporation should not be confused with the present Southern

Pacific Company—the original Texas Pacific Railroad Company acquired the railroad theretofore constructed by the former corporation. The Texas Pacific Railroad Company and its successor, the present The Texas and Pacific Railway Company, likewise acquired the properties and franchises of other railroads in Texas, Louisiana, and Arkansas, under which the existing system was built up. The said Southern Pacific Railroad Company was originally chartered as the Texas Western Railroad Company by a special act of the Legislature of Texas approved February 16, 1852, but by act of August 16, 1856, the Legislature changed the name of the line to the Southern Pacific Railroad Company (R. 898).

Its Physical Development and Location: Exhibit A-7 (reproduced in an accompanying volume of exhibits) is a map showing the location of this appellant's line of railroad. In submitting this exhibit, Mr. Payne further testified as follows (R. 898-99):

"Upon investigation of the records of the Texas and Pacific I find that in 1857* the Southern Pacific Railroad Company constructed 23 miles of railway from Marshall, Texas, to Swanson's Landing, Texas, which was located near the head of navigation on the Red River above Shreveport. During the Civil War this line was partly torn up by the Confederate Army and the route

*See also, **Texas & P. Ry. Co. v. Scott**, 77 Fed. 726, at bottom of page 728.

changed so that its eastern terminus was finally located near the Texas-Louisiana state line at Waskom, Texas. During the year 1869 this road was extended in a westerly direction from Marshall to Longview, Texas, a distance of some 23 miles.

"After the acquisition by the Texas & Pacific of this 46 miles of railway, and during the years 1872 to 1874, the line was extended westwardly from Longview through Dallas to a point known as Eagle Ford on or near the Trinity River, a few miles west of Dallas, and in 1876 a further extension to Fort Worth was made. Thereafter the line was continued on west until a connection was made with the present line of the Galveston, Harrisburg & San Antonio Railway Company, and from that connection to El Paso the road has since been operated over the tracks of that company under a joint-track agreement. Also, between 1872 and 1898 the Texas and Pacific operated into Shreveport, Louisiana, from the eastern terminus of its rails at Waskom, Texas, over the tracks of the Vicksburg, Shreveport & Pacific Railway Company. In 1872 and 1873 a northerly extension was made from Marshall to Texarkana, Texas-Arkansas, where a connection was effected with the line of the St. Louis, Iron Mountain & Southern Railway Company, now a part of the Missouri Pacific system, and shortly thereafter the line was connected up between Texarkana and Sherman, Texas, and Fort Worth, Texas.

"Various lines in Louisiana, the principal unit of which was the New Orleans Pacific Railway Company, incorporated by a special act of the Louisiana Legislature dated February 19, 1876, by which approximately 260 miles of railway between Shreveport and New Orleans were constructed, with an eight-mile branch to a point on the west bank of the Mississippi River opposite Baton Rouge, La., were taken over and absorbed by The Texas and Pacific Railway Company; so that at the present time it operates 1952.96 miles of railroad in the states of Texas, Louisiana, and Arkansas.

"The main stem of the railroad system so built up by The Texas and Pacific Railway Company extends in a northwesterly direction from the port of New Orleans, on the Mississippi River, to Shreveport, La., and thence almost due west through Marshall, Dallas, Fort Worth and Sierra Blanca, to the western border of Texas, at El Paso, a distance of 1146 miles. Other main-line tracks extend to the north from Marshall to Texarkana, as previously stated, and from Texarkana westwardly through Sherman to Fort Worth. There is also a line between Texarkana and Shreveport, together with several hundred miles of branch-line tracks in the state of Louisiana. The Texas and Pacific Railway Company, as was testified at the previous hearing, constitutes the short single-line between New Orleans and El Paso, from which point, in conjunction with the lines of the

Southern Pacific Company west of El Paso, it forms a direct line to the Pacific coast."

By Exhibit A-537 (R. 2993-94) it was shown in rebuttal that the rail line of this appellant between Shreveport and New Orleans was completed in 1882, but that as early as 1873, in which year it reached Dallas, the Texas & Pacific, in conjunction with boat lines up to Shreveport, was handling traffic between Dallas and New Orleans by means of its own rails west of Shreveport (R. 981). It thus will be observed that the Texas & Pacific* was a pioneer line in the upbuilding and development of that portion of the State of Texas tributary to its rails.

Its Financial History and Structure: Prior to October 26, 1888, on which date# the receiver was discharged, this appellant was involved in a receivership proceeding pending in the Circuit Court of the United States. Exhibit A-59 (R. 1030-a) sets out the reorganization of its property effected as of May 31, 1888, and describes the new series issued in lieu of outstanding capital ob-obligations amounting to $73,994,893.45 that were redeemed at that time (R. 1031). Attention is directed

*At pages 377-78 of the 1927 report of the Commission there appears the following (R. 3402):—"At the time this carrier first assumed its present general outline the only deepwater gulf ports were at New Orleans and Mobile. With the exception of the Houston & Texas Central, which entered northern Texas at about the same time, the Texas & Pacific was built into the northern portion of the State of Texas prior to the construction of any of the competing lines now reaching Texas ports."

#See **Brown, Receiver**, v. **Gay**, 76 Tex. 444, 445-46.

to the fact that an assessment of $10.00 per share was levied against the holders of the company's capital stock and that in lieu of outstanding Income and Land Grant Bonds, amounting to $7,792,428.45 the holders thereof received Second Mortgage Income Bonds to the extent of 60 per cent of the par value thereof, and for the remaining 40 per cent they were given a deed to the lands on which the mortgage securing the Income and Land Grant Bonds was a first lien. A copy of this Income and Land Grant Mortgage was filed as Exhibit A-514 and is one of the original exhibits accompanying the transcript herein.

Exhibit A-60 (R. 1032-a) and Exhibit B-44 (R. 3170) are statements of dividends declared and paid on the capital stock and Second Mortgage Income Bonds of this appellant from January 1, 1888, to December 31, 1925, and from January 1, 1926, to December 31, 1928, respectively. The *first* dividend paid on the appellant's common stock was declared on May 9, 1928 (R. 3169). Dividends were paid on the Second Mortgage Income Bonds issued in 1888 in only nine years up to the date of their retirement in 1924, the dividend rates in 1899, 1900, and 1907 having been but 1-1/2, 4 and 3-1/2 per cent, respectively, and 5 per cent for each of the other six years. On May 26, 1924, pursuant to *Texas & Pacific Readjustment*, 86 Inters. Com. Rep. 808, follow-

ing a second receivership which began in October, 1916 (*id.*), these Second Mortgage Income Bonds were retired and cancelled (except for some $282,000 yet outstanding) and in lieu thereof preferred stock was issued, on which dividends at the rate of 5 per cent were declared for the remainder of the year 1924 and for the years 1925 to 1928, inclusive, a like dividend being paid on the $282,000.00 of Second Mortgage Income Bonds not so far presented for redemption.

Exhibit A-58 (R. 1029-30) is a reproduction of the general balance sheet of this appellant as of December 31, 1925. From this exhibit it is seen that its total assets then amounted to $160,842,453.01, of which $145,086,215.66 represented investment in road and equipment. Among the liabilities outstanding on December 31, 1925, there were $38,755,110.00 of common stock and $23,703,000.00 of preferred stock, the latter issued May 26, 1924. Attention is further directed to the fact, as disclosed by Exhibits A-61a and A-515 (R. 1034, 2970) that the earnings of appellant, instead of being distributed in the form of dividends to stockholders, have been largely "ploughed back" into its property, in that, out of the item of accumulated corporate surplus amounting to $36,786,728.85 as of December 31, 1925, the sum of $30,305,848.04 has been devoted to improvements in the way of reinvestments in additions to and

betterments of the properties employed by it in the service of the patrons and communities along its line of railroad.

It was testified at the hearing in January, 1929 (R. 3174), that the total additions and betterments to the property of appellant since June 30, 1916, were, in round figures, $59,000,000.00, and that in 1927 alone the company spent $6,327,524.68 for additions and betterments. The wisdom of this policy was convincingly demonstrated in 1928, as, except for "the foresight and ability of the managing officers of the Texas & Pacific in providing proper facilities and properly using them," it "would have been swamped by the sudden oil traffic" that developed in that year, incidentally the most prosperous in its history, and would have probably lost money rather than have made any" (R. 3267).

The yearly accumulation of the corporate surplus of appellant during and since its recent receivership, extending from October 27, 1916, to May 14, 1924, is shown in Exhibit A-515 (R. 2970), and in connection therewith there was submitted a statement of its property investment and the annual rate of return thereon for the years 1916 to 1925, inclusive (R. 2971). At no time during that period did the rate of return exceed 4.90 per cent, and in 1920 it was as low as 1.12 per cent. The capital stock and funded debt of this appellant, as shown by Exhibit B-45 (R. 3172a), amounted to a total

of $121,117,410.36 as of December 31, 1928. Exhibit A-61a (R. 1034) is a statement of the annual expenditures made by appellant for additions and betterments since the date of federal valuation (June 30, 1916) to December 31, 1925, amounting to $35,905,417.44 in the aggregate. By adding this to the investment in road and equipment as of June 30, 1916, the total investment of $145,086,215.66 set out in Exhibit A-58 is obtained.

Its Traditional Policy as to Port Equalization: The export, import, and coastwise traffic with which this controversy is concerned, it can not be too strongly emphasized, has neither origin nor destination at the ports, as in the case of shipments of domestic traffic, that is, traffic which either is produced at the ports or else is there consumed. As stated by the Commission in its 1927 report (R. 3391), "A port is neither the destination nor the origin of traffic passing through it," or, in the more picturesque language of Commissioner Hall in his dissenting opinion thereto (R. 3429), "The ports are but outlets, way-stations on the longer journey to or from foreign lands or our own distant coasts."

It therefore follows that this foreign and coastwise traffic is free to move, and does move, by the lines of least resistance. It has a common origin and destination, and may move (unless arbitrarily debarred) through one port or another, as the shipper may consider most preferable. In both its 1925 and 1927 reports (R.

3348, 3387) the Commission in substance made the finding that, generally speaking, the ocean rates are the same to and from all the gulf ports. It therefore follows as a mathematical calculation that, where a higher rail factor is maintained between one of such ports and an interior point than between such interior point and another port, the total *through* transportation charges via the former are correspondingly higher than through the latter. That commerce seeks the line of least resistance was testified by numerous witnesses (R. 424, 1078, 1336, 1423, 1611, 2326, 2758); indeed, this principle may be regarded as axiomatic, and in fact has long had unquestioned recognition from this Court. See *Interstate Commerce Commission* v. *Louisville & N. R. R.*, 190 U. S. 273, at page 282.

Commenting upon the history of the respective gulf ports, in the course of its 1927 report (R. 3385) the Commission in part said:

> "Galveston and the other Texas ports were established long after New Orleans was recognized as a port. The first substantial federal appropriation toward the establishment of Galveston as a port was made in 1890, shortly after a board of engineers of the United States Army had selected Galveston as the most desirable location for a port west of New Orleans which would be readily accessible to the extensive territory then rapidly developing in Texas, Oklahoma, Kansas, and other states west of the Mississippi River."

In the light of this historical background, the Commission further on in its 1927 report (R. 3402-3)* thus summarizes the testimony of Vice President Payne (R. 899-901, 962-64), as depicted in his Exhibit A-39 (reproduced in an accompanying volume of exhibits; and in his Exhibit A-40 (R. 964-65):

"At the time this carrier [the Texas & Pacific] first assumed its present general outline the only

*A general summarization of the contentions advanced by those opposing the complaint of the Galveston Commercial Association is to be found on page 119 of the Commission's 1925 report (R. 3357-58), reading:

"Defendants state that export rates are dependent largely upon considerations other than distance, which is of minor importance compared with other factors; that the question of port equalization is not a general one, applicable alike to all traffic without differentiation; and that the character of the specific commodity, the volume of its movement, the carrier and commercial competition affecting it, the character of the agreements for divisions of joint rates, and empty-car movement are among the factors to be considered. They take the position that a reasonable rate to the nearer port may fluctuate within limits sufficient to permit of its extension to a farther port without loss or at some profit; that the equalization of the ports of New Orleans and Galveston is not different in principle from the equalization of Galveston with other Texas ports, or the equalization of circuitous with short lines from given points to Galveston or other Texas ports, some of which equalizations ignore substantial differences in distance; that the question of equalization depends in each instance, in short, upon the facts surrounding the transportation of the specific commodity and is not susceptible of determination by a hard and fast rule of relative distances for all commodities; that the test should be whether the rates to New Orleans are unreasonably low and a burden on other traffic, or the rates to Galveston are too high and likewise a burden on that and other traffic; that within reasonable limitations, subject to review by us in specific instances, the carriers should be left free to equalize New Orleans with Galveston, in their discretion, on specific commodities, even though there is a material difference in distance in favor of Galveston; and that the principle of port equalization should be encouraged rather than restricted, in the interest finally of all the ports themselves as well as of the general public."

deepwater gulf ports were at New Orleans and Mobile * * *. When the north-and-south lines now serving the Texas ports and which intersect the Texas & Pacific at various points were constructed, there developed a competitive situation between those lines and the Texas & Pacific for the transportation of foreign and coastwise traffic originating in or destined to territory contiguous to that carrier and in the territory north thereof. The Texas & Pacific is intersected in Texas by north-and-south lines at intervals of approximately every 40 miles. The population of these junction points, according to the 1920 census, was 471,410, as compared with a total population of 40,297 at all other open stations on this carrier in Texas. It has been the practice of this carrier since this competitive situation arose to maintain a parity in the through rates and charges via New Orleans on foreign and coastwise traffic moving between interior points on its own lines and its connections in Texas, Oklahoma, southern Kansas, and certain other States, on the one hand, and coastwise and foreign destinations, on the other, with rates or charges applicable from or to the same points on traffic moving via Galveston and other Texas ports; and since the ocean rates to and from foreign or coastwise destinations have been and are generally the same from and to all Gulf ports, this policy has resulted in maintaining the same rail rates to and from New Orleans as the competing carriers have maintained to and from the Texas ports. It maintains that this principle of equalization is calculated to best protect and promote the interests of interior shippers engaged in foreign and coastwise commerce, and to preserve a healthy and vigorous competition between rail and water carriers, and between ports."

As a matter of fact, the rail rates to and from the ports with which we are concerned in this proceeding are in reality nothing more than proportional rates, or what might be termed *pseudo* divisions of through export, import, and coastwise rates. In paragraph (c) of § 6 (13) of the Interstate Commerce Act, proportional rates as related to traffic moving partly by water are defined thus:

> "By proportional rates are meant those which differ from the corresponding local rates to and from the port and which apply only to traffic which has been brought to the port or is carried from the port by a common carrier by water."

In *Hocking Valley Ry. Co.* v. *Lackawana Coal & L. Co.*, 224 Fed. 930, 931, a proportional rate is defined as "simply a part of a through rate," or "the share of the aggregate charge from origin to destination which one or more of the carriers accept for performing a definite portion of the whole transportation service." Similarly, in *Kemble* v. *Boston & A. R. R. Co.*, 8 Inters. Com. Rep. 110, 120, there appears the following:

> "The rate to East Boston for domestic consumption is the same as the rate to Boston. The export rate, as we have already seen, is essentially the division of a through export rate. It is not made under the same circumstances and conditions with the domestic rate to Boston, and is not, therefore, within the prohibition of the fourth section."

Effect of the Prescribed "Differentials" on this Appellant: At the 1926 hearing (R. 901, 903-5) the ranking traffic official of the Texas & Pacific, Mr. Payne, testified at some length as to how this appellant would be affected if compelled to publish and maintain on traffic moving through the ports rates to and from New Orleans "differentially" higher than the rates observed on such traffic to and from Galveston or some other Texas port. For the convenience of the Court, we here quote in part from the testimony of said witness:

> "The enforcing of differentials against New Orleans and in favor of Galveston, as ordered by the Commission in this case, will, we believe, have the same practical effect that would follow the absolute cancellation of export, import and coastwise rates and the substitution therefor of domestic rates such as was done by the Railroad Administration, which the Director General quickly discovered was prejudicial to the public interest.
>
> "The order of the Commission penalizing a route between a given point in the United States and a given point in a foreign country because the length of the rail haul to or from the seaboard may be greater via such route but not so great as to render the service unprofitable or impose a burden on other traffic, and although the through distance may be less, is contrary to the spirit of fourth section relief, based on circuity authorized by the Transportation Act and heretofore granted by this Commission.
>
> "The order, if sustained, would reduce competition between carriers because it would eliminate all

routes heretofore open to our foreign commerce except those routes operating through the favored ports. The Texas & Pacific could not be expected, upon application of one of its industries, to initiate a reduction to the port of New Orleans on export traffic moving through to Liverpool, for example, with the knowledge that, automatically, from the same point to the same destination, the rate would become less via the lines of its competitors, and, conversely, the railroads leading to Galveston would go slow in reducing export rates to Galveston for the reason that they are protected by the Commission in their monopoly of the lowest rate, so 'why go lower?' The result would be the 'freezing' of the rates on the foreign commerce of the states now enjoying a flexible rate structure.

"This order of the Commission, if it should prevail, would restrict competition between ports; a shipper would no longer telegraph the booking agencies at New Orleans for ocean rates and ocean room in the face of an inland transportation differential, effectually closing the route via New Orleans. On the other hand, the booking agency in the favored port could take his time in responding to the inquiry from the inland shipper and would be free to adjust his charges upward in view of the margin allowed him in the differential favoring his port. The facilities at the favored port would have to be employed by the shipper regardless of the condition, age and adaptability of such facilities, because the shipper would have no free choice as to ports. He must use those ports preferred by the orders of the Interstate Commerce Commission.

"The differentials would restrict competition between ocean carriers because, while the ocean rates

are now understood to be equal, if additional tonnage is artifically forced to the favored port and cannot go elsewhere, it would not be bad practice on the part of the ships to get what they could out of that tonnage. In view of the great preponderance of export tonnage as compared with import tonnage at Galveston, it would be quite natural for the ships to recoup the loss on their light inbound tonnage by increasing rates on outbound traffic.

"They would have it within their power to levy a tax upon the foreign commerce of the United States transferred to them by this order of the Interstate Commerce Commission, while under current equalization practices they have no such power and competition has free play, with the exporter enjoying the minimum competitive charges and the maximum of competitive service.

"The differentials would destroy the economic right of the Texas & Pacific Railway to handle its 'originated' traffic the full length of its line, where it does not place a burden upon other traffic.

"The differentials would place at a disadvantage the shippers in Louisiana along the line of the Texas & Pacific and its immediate connections by depriving them of the natural and most economical flow of equipment necessary for the marketing of their products, making it more difficult and costly to supply cars. The Texas & Pacific, under present export rate equalization adjustments, is compelled to haul, in addition to the box cars loaded with export traffic, empty equipment in the direction of New Orleans and into New Orleans proper to care for loading requirements; and if these differentials should be enforced, there would be diverted from the Texas & Pacific annually more than 100,000 tons of

freight without reducing in any respect whatever the number of box cars this railroad would continue to handle in its freight trains to New Orleans and Louisiana. The order would require that the export freight be taken out of the cars and we would have to move them empty instead of loaded; they would then be a burden on other traffic instead of paying their way as they do now.

"It would still further cripple the Texas & Pacific and its shippers in connection with its equipment supply, because it would divert via short-haul junctions to the favored ports the cars now supplied by the Texas & Pacific for loads on its own line and hauled to destinations on its own line, and would cause a diversion by the connections of the Texas & Pacific of cars heretofore moving to the Texas & Pacific for handling to New Orleans. The traffic originated by the Texas & Pacific in New Orleans and Louisiana and its immediate connections in Louisiana represents a substantial volume of the total tonnage produced by it requiring box-car equipment. A large portion of it is competitive with other carriers and a plentiful and prompt supply of equipment is necessary to hold it."

And on cross-examination (R. 1002) Mr. Payne declared that "In a short time I think we would be deprived of all this traffic unless we had the same rate as Galveston." The traffic witness for the Santa Fe later agreed (R. 2325) that the "differential" rates to New Orleans would serve to eliminate the competition of the Texas & Pacific. In his Exhibits A-32a and A-32b (R. 954-55), Mr. Payne submitted a statement of the ton-

nage (and the revenue accruing to the Texas & Pacific thereon) of foreign and coastwise traffic handled by it to or from New Orleans, and having origin or destination at points in Texas located more than 100 miles farther distant from New Orleans than from Galveston, during the year ended August 31, 1925. Commenting upon these data, the Commission at page 382 of its 1926 report (R. 3407-8) in part said:

> "The total revenue derived by the Texas & Pacific during the year ended August 31, 1925, from traffic through the Louisiana ports on which differentials are prescribed in the original report was $500,731.58, and on other commodities in foreign or coastwise movement from and to the same points $102,639.10. Of the former amount about 26 per cent was derived from traffic originated at or destined to points on the Texas & Pacific and about 74 per cent from traffic coming from or going to its connections. If this traffic had moved through Galveston the divisions which it would have received from traffic on which differentials were prescribed in the original report orginated at or destined to points on its line would have amounted to $51,636.50, and on traffic which moved under rates not under review in this case $5,323.81, or a total of $56,960.31. According to its exhibits, therefore, if all of the foreign and coastwise traffic which moved over the Texas & Pacific to or from New Orleans during that year had been diverted through Galveston the gross revenue lost to this carrier would have been $149,095.08 on the commodities included in the original report and $546,410.37 on all commodities."

In presenting these figures, Mr. Payne testified (R. 953) that, "In arriving at the revenue loss to the Texas & Pacific, we have deducted from the gross revenue on the traffic involved the divisions of the Texas & Pacific which would accrue on its local traffic up to its junction point with Texas port lines if moved through Texas ports instead of through New Orleans," from which it would seem that the further deductions made by the Commission to arrive at the last two items in the above quotation were erroneous. This, however, is not of sufficient consequence to quibble about. The bare fact remains that, had the movement of the traffic been diverted to the Texas ports, this appellant would have received at most as a division of the through charges some $50,000.00, and would have been deprived of the use of its line to New Orleans on such traffic and the additional revenues accruing thereon, amounting to some $500,000.00 or more. To this extent, therefore, we maintain that the effect of the Commission's orders herein is to deprive it of its constitutional right to do business and of the use of its property, a subject which will hereafter be more fully treated.

More broadly speaking, it requires no great flight of the imagination to realize that the object sought to be obtained by the complaint before the Commission, as well as by the orders entered by the Commission herein, is to divert the movement of the traffic in question away

from the port of New Orleans and from the lines of the New Orleans carriers, and to arbitrarily force the movement thereof through the respective Texas ports. Were this not so, the filing of the complaint was a vain act, as likewise was each of the orders of the Commission entered in conformity therewith. And that such a consummation would result from its action was indeed fully appreciated by the Commission itself. Thus, without undertaking to point out each and every expression of the Commission to that effect, we cite as illustrative the ensuing excerpts from the findings made by the Commission on this subject. On page 366 of the Commission's 1927 report (R. 3388) there appears the following paragraph:

> "The testimony leaves little doubt that the differentials prescribed in the original report, or even smaller differentials on most of the commodities, would in time divert to the Texas ports a substantial portion of most of the commodities having origin or destination in the affected territory that are now moving through New Orleans. On several of the commodities, however, green coffee, for instance, the movement that would be diverted from New Orleans would probably be small. The establishment of differentials would seem more certain to divert from New Orleans practically all of the movement of grain and grain products and petroleum and petroleum products originating in differential territory than any of the other commodities."

And on page 369 of the same report (R. 3391-92) we find the following:

> "The effect of differentials upon the interests of exporters and importers at Gulf ports and of shippers at interior points merits consideration. The evidence in this respect is confined chiefly to grain and grain products and petroleum and petroleum products. The present equalized basis of rates gives the producer in the interior the advantage of a choice of ports, and, with the ocean rates the same, the shipper is given the fullest measure of competition between the steamship lines serving the different ports. On the heavy-moving commodities, such as grain and petroleum, a rate difference of 1 cent per 100 pounds will normally turn a sale and control the movement through one port or another. If, therefore, the shipper or exporter who ships largely or wholly through the Texas ports could secure a differential under New Orleans on his shipments he would be advantaged to that extent as compared with his competitor who ships largely or wholly through New Orleans. Conversely, the shipper or exporter who is primarily interested in New Orleans would be placed at a disadvantage under such a differential in shipping from or to points in the affected territory."

Moreover, throughout the hearings it apparently was regarded as an accepted fact that the effect of the maintenance of "differentially" higher rates on the traffic in question through New Orleans than through the Texas ports would result in diverting the movement thereof from the former and to the latter. And this

opinion was shared indiscriminately among witnesses testifying in support of the complaint as well as those testifying in opposition thereto. Repeated citations to such expressions might be given, but, leaving out of account the views entertained by the witnesses who appeared in opposition to the complaint, we believe the following extracts from the testimony of witnesses on behalf of the complainant may fairly be regarded as typical.

Thus, an officer of the Galveston Steamship Company expressed the view (R. 1894) that "The application of those differentials would not cause all of the business for export to come to the Texas ports instead of New Orleans, but I believe that the majority of it would move through the Texas ports."

The witness testifying for account of the Houston Chamber of Commerce (R. 1925, 2004) said: "If we get these differentials established, I hope there will be an increase in the volume of tonnage at both Galveston and Houston. I feel certain there will be."

The witness who appeared for the Beaumont interests (R. 2056, 2071) likewise said: "We hope, as the result of this decision, that the exports moving into these Texas ports will so increase that this increased number of steamship lines will bring back an increase in import traffic to equal that of the outbound export traffic. We expect that in a substantial degree."

The General Manager of the Galveston Wharf Company (R. 2087, 2091-92) testified thus: "There are concerns in Houston that have been there a good many years, that have done business there, that formerly barged their stuff down. They are going to handle that stuff up there. If they were not there, that would all be loaded on ships at Galveston, but it is a fact also that if the differential that is in question in this case were made effective, we think there would be plenty of business for all of these ports. If we get all we are asking for and got all the business that goes in and out of Oklahoma, southern Kansas and Texas, it would vastly increase the business at these ports."

A steamship soliciting agent at Houston (R. 2115, 2118) voiced his opinion as follows: "I am familiar with the decision that was rendered by the Commission in this case. I think those differentials the Commission prescribed are sufficient to divert a substantial portion of the traffic to Texas ports from New Orleans."

The following observations made by the General Freight Agent of the Gulf, Colorado & Santa Fe Railway Company (R. 2274, 2324-25) are quite significant. He said: "Anything that is good for the Texas ports—will make an increased movement of traffic through them—will also make an increase in traffic on the Santa Fe Railroad. * * * The effect of this order will not change what is now competitive traffic, * * * There

are several railroads operating to [between] the Texas ports and north Texas and it will be just about as competitive as it has been heretofore, *eliminating the Texas & Pacific only.*" And again (R. 2326): "It is my view that if the Commission in this proceeding puts in a differential, Galveston under New Orleans, it will increase our import traffic."

Like views were entertained by the traffic witness for the Trinity & Brazos Valley Railway Company. Thus (R. 2415): "* * * my judgment would be that the establishment of the differential laid down by the Commission in this case would result in added traffic to the Texas ports. Anything that has a tendency to increase traffic to the Texas ports will naturally give us an opportunity to that extent to participate relatively in such increased traffic—I mean the Trinity & Brazos Valley Railway Company,—especially if there is an opportunity to develop some north-bound traffic as well as south-bound."

It would seem to be supererogatory to continue further. The mere fact that a record consisting of more than 8,000 pages of testimony and of almost 1,000 exhibits, many of them quite voluminous and complicated, is alone sufficient to demonstrate that the complainant and its cohorts expected to derive a substantial financial benefit by obtaining from the Commission an order

which would arbitrarily force through the Texas ports the movement of a large volume of foreign and coastwise traffic that otherwise, that is to say, the rates being equal, would be free to move through New Orleans and over the rails of the appellant carriers.

———x———

FIRST PROPOSITION

An order of the Commission will be voided and set aside—

(1) if violative of constitutional limitations, or

(2) if not within the scope of its statutory authority.

(Germane to Assignments Nos. 12, 13h, 23, 25, 26 and 28.)

Interstate Commerce Commission v. *Ill. Cent. R. Co.*, 215 U. S. 452, 470;

Interstate Commerce Commission v. *Union P. R. Co.*, 222 U. S. 541, 547;

Sou. Pac. Co. v. *Interstate Commerce Commission* (the *Williamette Valley case*), 219 U. S. 433, 444-52;

United States v. *New York Central R. Co.* (the *Passenger Scrip case*), 263 U. S. 603;

Ann Arbor R. Co. v. *United States* (the *Deciduous Fruit case*), 281 U. S. 658;

Anchor Coal Co. v. *United States*, 25 Fed. (2d) 462;

(3) if based upon a misinterpretation of the law, or

(4) if based upon an erroneous conception of its powers and duties.

(Germane to Assignments Nos. 10 and 24.)

Texas & P. Ry. Co. v. *Interstate Commerce Commission* (the *Import Rate Case)*, 162 U. S. 197, 217;

Interstate Commerce Commission v. *Ill. Cent. R. Co., supra;*

Interstate Commerce Commission v. *Northern P. R. Co.*, 216 U. S. 538, 544;

Sou. Pac. Co. v. *Interstate Commerce Commission, supra.*

Interstate Commerce Commission v. *Union P. R. Co., supra;*

United States v. *New York Central R. Co., supra;*

Ann Arbor R. Co. v. *United States, supra.*

(5) if unsupported by competent evidence, or

(6) if contrary to or in disregard of unrefuted facts established of record.

(Germane to Assignments Nos. 6, 7, 8, 9, 16 and 28)

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 227 U. S. 88, 92;

Interstate Commerce Commission v. *Union P. R. Co., supra;*

Florida East Coast R. Co. v. *United States*, 234 U. S. 167, 185;

Akron, C. & Y. R. Co. v. *United States*, 261 U. S. 184, 203;

United States v. *New York Central R. Co., supra;*

Chicago Junction Case, 264 U. S. 258, 265;

United States v. *Abilene & S. R. Co.*, 265 U. S. 274, 288;

International Shoe Co. v. *Federal Trade Commission*, 280 U. S. 291, 299;

Chesapeake & O. R. Co. v. *Martin*, 283 U. S. 209.

(7) If, although purporting to act within the form of its delegated authority, its action is so arbitrary and unreasonable as in fact to be in excess thereof.

(Germane to Assignments Nos. 2, 3, 4, 5, 10, 13j, 24 and 28.)

Interstate Commerce Commission v. *Ill. Cent. R. Co., supra;*

Interstate Commerce Commission v. *Union P. R. Co., supra;*

Sou. Pac. Co. v. *Interstate Commerce Commission, supra.*

The principles laid down in the foregoing proposition have been so well established that we deem it superfluous to undertake at this point to restate the language of the Court in the cases cited. It will be our purpose, however, to demonstrate under succeeding propositions that in its reports and orders in the cases herein under review the Commission has acted both in disregard of

and contrary to the evidence before it, has misinterpreted and misapplied the governing law, as laid down by this Court, has exceeded the powers conferred upon it under the constitution and laws of the United States, and has in other respects entered and adopted orders in said proceedings which are unsupported and unjustified by the law and the evidence. We shall further show that, in undertaking to give effect to the conclusions arrived at by it in said proceedings, before adopting the reports of its Examiners the Commission has in one instance expunged therefrom a reference made by the Examiner to the declaration of this Court in one of its decisions and substituted therefor a decision of its own wherein a contrary conclusion was expressed, and has otherwise deliberately rejected and struck from said reports findings of fact based upon credible and uncontroverted evidence.

SECOND PROPOSITION

In an action to restrain the enforcement of an order of the Interstate Commerce Commission, the Supreme Court will determine whether, as a matter of law, the Commission's findings of fact sustained its conclusions of law and its order based thereon.

Interstate Commerce Commission v. *Louisville & N. R. Co.*, *supra*, at page 92.

Central R. R. Co. v. *United States*, 257 U. S. 247, at pages 256-57.

Although it will be shown that in certain respects the Commission's findings of fact are either unsupported by the evidence or are contrary to and in disregard of uncontroverted evidence of record, and while the appellants herein feel that in other respects its findings of fact might have been made more favorable than they were, nevertheless, generally speaking, it is the position of appellants that the Commission's conclusions of law or its finding of the existence of undue preference and prejudice as an ultimate fact are unsupported by and do not legally or logically follow from the basic findings of fact made by it in its several reports in the cases herein under review. Accordingly, we maintain that the case at bar falls within the following holding of this Court in the first of the cases cited above: "But the legal effect of evidence is a question of law." Similarly, citing two of the Court's prior decisions, in *Central R. R. Co.* v. *United States*, *supra*, the Court said:

> "But the question presented here is whether the discrimination found can be held in law to be attributable to the appellants, and whether they can be required to cancel existing joint rates, unless it is removed. No finding made by the Commission can prevent the review of such questions."

THIRD PROPOSITION

Common carriers have the right and authority, under existing law, to determine initially their rates and rate policies in the exercise of managerial discretion, subject to correction only if determined after proper hearing and review to be illegal.

(Germane to Assignment No. 13d.)

Interstate Commerce Commission v. *Ala. Mid. R. Co.*, 74 Fed. 715, 723-24 (affirmed 168 U. S. 144, 172-73);

Interstate Commerce Commission v. *Chicago G. W. R. Co.*, 209 U. S. 108, 118-19;

Interstate Commerce Commission v. *Louisville & N. R. Co., supra;*

Skinner & Eddy Corp. v. *United States*, 249 U. S. 557, 564;

United States v. *Illinois Cent. R. Co.*, 263 U. S. 515, 522;

United States v. *Missouri P. R. Co.*, 278 U. S. 269;

Sou. Pac. Co. v. *Interstate Commerce Commission, supra;*

Atchison, T. &. S. F. Ry. Co. v. *Interstate Commerce Commission*, 190 Fed. 591, 594;

Western Passenger Fares, 37 Inters. Com. Rep. 1, 41.

Under the law as it now exists, and in particular §§ 1, 2, and 3 of the Interstate Commerce Act, we sub-

mit that a common carrier engaged in interstate and foreign commerce in this country has the right to inaugurate and put in effect rates and rate policies which serve to advance its own interest and to increase its ability to render efficient transportation service to the shipping public, including not only those communities located immediately on its own rails, but also those served by it indirectly through connecting lines of railway which are willing to join and co-operate with it in the maintenance of such rates and policies of rate making. And unless the rates and rate policies so put into effect offend some provision of the Interstate Commerce Act, or are otherwise unlawful, it is submitted that the carriers responsible therefor have the right to continue same without let or hindrance.

Respecting the freedom of a carrier to initiate rates designed to redound to its individual benefit, subject to correction only for a violation of the law, the following excerpt from the opinion of the Circuit Court of Appeals in the case of *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 74 Fed. 715, 723-24, was quoted with approval by the Supreme Court upon the appeal of the same cause *(Int. Com. Com.* v. *Alabama Midland R'y.*, 168 U. S. 144, at pages 172-73):

> "* * * within the limits of the exercise of intelligent good faith in the conduct of their business, and subject to the two leading prohibitions that their

charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers, as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and, generally, to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. *The carriers are better qualified to adjust such matters than any court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business.*" (Emphasis ours.)

The foregoing language has been cited with approval by this Court in a number of its subsequent decisions, and as late as 1919, in *Skinner & Eddy Corporation* v. *United States*, *supra*., at page 564, Mr. Justice Brandeis, speaking for the Court, said:

"It is important to bear in mind the limits of the Commission's control over rates. Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them. Legislation of Congress confers now upon the Commission ample powers to

> prevent by direct action the exaction of excessively high rates."

Nor was any change in this respect brought by the change of public policy referred to by this Court in *Dayton--Goose Creek R. Co.* v. *United States*, 263 U. S. 456, 478, as reflected in the Transportation Act, 1920. Thus, in *United States* v. *Illinois Cent. R. Co.*, *supra*, contemporaneously decided in January, 1924, the Court specifically declared that—

> "A carrier is entitled to initiate rates, and, in this connection, to adopt such policy of rate making as to it seems wise."

And even more recently, in *United States* v. *Missouri P. R. Co.*, *supra*, interpreting the scope of § 15 (4) of the Interstate Commerce Act, this Court declared that the purpose of the statute "is to protect the long-haul routes of carriers." (The right of the appellant carriers to retain their long haul on the traffic involved herein surely falls within the spirit, even though not the letter, of this statute.)

That the Commission itself, when it deems the occasion so warrants, recognizes this legal truism is demonstrated by the following extract taken from its report in *Western Passenger Fares*, 37 Inters. Com. Rep. 1, 41:

> "It is not the function of the Commission to prescribe either public policy or the managerial policy of the carriers."

Such being the present state of the law, it follows that the long-established and time-honored policy of the carriers serving New Orleans, along with many of their connections, of voluntarily maintaining that port on a rate parity with the Texas ports, where the distances to the latter are less than to New Orleans, is not subject to condemnation unless in some particular it is in contravention of the law. While as originally brought the amended complaint in cause No. 12798 alleged that the rates therein assailed were unreasonable, in violation of § 1, and unduly preferential of New Orleans and unduly prejudicial to Galveston, in violation of § 3, we have seen, and the Commission so states in its reports (R. 3348, 3373), that the issue of unreasonableness was withdrawn by complainant at the hearing.

Hence, except for alleged violations of other statutes (as hereinafter given consideration), the issue narrows down to a determination of the existence of *vel non* of undue preference and prejudice, as alleged under § 3 of the Interstate Commerce Act, and it was in effect so stated by the Commission (R. 3348, 3373). It is perhaps proper to add here that in its 1925 report (R. 3353) the Commission unqualifiedly declared that "there is no evidence upon this record tending to show that any

of the present rates to New Orleans are so low as to throw a burden upon other traffic." This statement is abundantly supported by the evidence of record, and in neither of its subsequent reports was such declaration withdrawn. However, we shall have occasion to comment more fully upon this feature in a subsequent section devoted more particularly to a discussion of the facts.

For ready convenience, we quote below the relevant portions of § 3 of the Interstate Commerce Act:

> "(1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

FOURTH PROPOSITION

In view of the Commission's explicit declaration that the Texas and Pacific Railway Company and the Louisiana Railway & Navigation system (now in part the Louisiana & Arkansas Railway Company), neither of which serves with its own rails any of the Texas gulf ports, have no controlling voice in fixing the level of the assailed rates thereto, the maintenance by them (as quasi-proportional rates) of the same rail rates on shipments of foreign and coastwise traffic to and from New Orleans and other Louisiana ports served by them as are contemporaneously maintained on like traffic to and from Galveston or any of the other Texas ports by competing carriers does not, as a matter of law, result in undue prejudice to the latter or undue preference of the former.

(Germane to Assignments Nos. 6, 13i, 15, 16, 18, 22, 24 and 28.)

East Tennessee, V. & G. R. Co. v. *Interstate Commerce Commission*, 181 U. S. 1, 18-19;

Penn Refining Co. v. *Western N. Y. & P. R. Co.*, 208 U. S. 208;

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42;

American Express Co. v. *South Dakota*, 244 U. S. 617, 624;

Central R. Co. of N. J. v. *United States* (the *Creosoting-in-transit case*), *supra;*

United States v. *Ill. Cent. R. Co.*, 263 U. S. 515, 521;

United States v. *Pennsylvania R. Co*, 266 U. S. 191, 199;

Minneapolis & St. L. R. Co. v. *Peoria & P. U. R. Co.*, 270 U. S. 580, 582.

By reference to Exhibits A-7 and A-39 (each reproduced in an accompanying volume of exhibits), it will be seen, as previously noted, that the line of railroad of this appellant between New Orleans, La., and El Paso, Texas, extends in a general east-and-west direction, this being particularly true as to that portion of the line extending westwardly through Texas from Shreveport, La. We have also seen, as previously remarked, and as found by the Commission (R. 3402), that appellant's line in Texas is intersected by north-and-south lines serving the Texas ports, directly or indirectly, at intervals of approximately every 40 miles, and that, according to the 1920 census, the population of these junction points was almost twelve times that of the total inhabitants at all other open stations on its line in Texas. Also, the greater volume of the foreign and coastwise traffic moving to and from points on the line of appellant originates or terminates at these junction points (R. 3452); in fact, the movement from the other points is limited (R. 3198, 3285).

Neither the origin nor the destination of the traffic with which this proceeding deals is at the ports. It has, however, we repeat, a common origin and a common

destination. In the case of a given shipment moving for export, under an equality of rates, it is free to move by rail from a specified interior point to any available port and thence by water to its foreign destination, and likewise, in the case of an import shipment, it may move via any available port from a common foreign origin to a common interior destination. Being neither produced nor consumed at any of the ports, such shipments are "free traffic," in that they are free to move via the line of least resistance and hence through any port or route offering the lowest transportation charge.

Let us take, for illustration, a shipment of cottonseed cake from Mineola, Tex., a point on the line of this appellant, to a foreign destination, say, Antwerp, Belgium. As disclosed by the evidence and as found by the Commission (R. 1002-3, 3348, 3387), there is ordinarily no difference in the ocean rates from any of the gulf ports to Antwerp. On and prior to December 12, 1927, the rail rate from Mineola to Houston was 25 cents per 100 pounds, and to Galveston it was 27 cents (R. 3444). Substantially the same is true as to other points, such as Dallas (R. 3021). Upon arrival at the port, the shipment is ready for delivery to the water carrier for further transportation to its final destination. So far as the shipper is concerned, it is of no greater value to him to have his cottonseed cake at New Orleans or Galveston than at Houston, the further transportation

charge being the same in any event. Hence, for this appellant to publish and maintain a higher rate on the traffic from Mineola or Dallas to New Orleans than is at the same time published and maintained by another line of railway from Mineola or Dallas to Houston will result in the loss of the traffic to such competing line of railway and its movement through the port of Houston. As between Galveston and Houston, the same carrier that serves one port serves the other (R. 727), and therefore has not the same competitive situation confronting it as that to which this appellant is subject.

The foregoing illustration is taken from the Commission's 1929 report (R. 3444), and is intended to bear out its immediately preceding statement to the effect that, under the readjustment of rates which followed its 1927 report and order, lower rates were published in some instances from points on the line of this appellant to New Orleans than were published from the same points to Galveston. It is obvious, though, that so long as a lower rate is applied to Houston than to Galveston no injury can result to the latter point by the extension of such lower Houston rate to New Orleans. Whether the New Orleans rate is the same as or higher than the Galveston rate, the shippers will still have available the lower Houston rate of 25 cents as contrasted with the Galveston rate of 27 cents, and we confess our inability to see how Galveston can suffer any damage by having

the rate to New Orleans made the same as the rate that would apply to Houston in any event. Neither does any injury result to Houston where the same rate is applied to New Orleans as to that point.

In view of the situation outlined above, it becomes necessary to ascertain whether there exist any circumstances or conditions which would operate to make unlawful the practice of this appellant in maintaining the *same* rate to New Orleans from a point on its line as contemporaneously applies to Galveston or some other Texas port. Evidently sensing the need for some such justification therefor, in its 1925 report (R. 3358-59) the Commission (through Division 2) stated, "It is important to note here that the Texas & Pacific, serving New Orleans, and the International-Great Northern, serving Galveston, are now both controlled by the Missouri Pacific." In support of this statement the Commission cited two of its finance decisions, namely, *Control of International-Great Northern R. R.*, 90 Inters. Com. Rep. 262, and *Control of Gulf Coast Lines*, 94 Inters. Com. Rep. 191. Neither of these cases, however, had anything to do with this appellant, nor was there any evidence of record at that time remotely indicating that the Texas & Pacific was in any sense controlled by the Missouri Pacific.

As previously stated, the rate readjustment ordered in the Commission's 1925 report never became effective.

In the course of the 1926 hearings, the question of the alleged Missouri Pacific control of the Texas & Pacific was gone into quite extensively, and in its 1927 report, after reviewing the evidence and the governing authorities, the Commission reached the conclusion (R. 3406) that "the Texas & Pacific is an independently operated carrier and is not to be regarded as a part of the Missouri Pacific system." The intercorporate relation between the Texas & Pacific and the Missouri Pacific was again made an issue at the 1929 hearing, but in its 1929 report (R. 3455) the Commission made no change in its prior holding on that point. Indeed, on the strength of this additional evidence, in his dissenting opinion (R. 3459) Commissioner Meyer declared that the present record "clearly negatives" his prior assumption that the grant of authority to the Missouri Pacific in *Texas & Pacific Readjustment*, *supra*, meant practical control of the policy of the Texas & Pacific by the Missouri Pacific."

After expressing the conclusion in its 1927 report that the Texas & Pacific is not to be regarded as a part of the Missouri Pacific system, the Commission thereupon added (R. 3406):

> "Since the Texas & Pacific, therefore, does not serve any Texas port, and has no controlling voice

> in fixing the level of the assailed rates to any of the Texas ports, it can not be held guilty of undue preference or prejudice under the circumstances of this case. This is also true of the Louisiana Railway & Navigation system."

On the strength of the foregoing finding and conclusion, which have not since been abandoned or abrogated, the Commission, as previously observed, exempted from the requirements of its 1927 order all points on the lines of the Texas & Pacific and of the Louisiana Railway & Navigation Company of Texas, but such exemption was thereafter withdrawn, and perforce of the 1929 order of the Commission those carriers were compelled to readjust their rates to and from New Orleans on the involved export, import, and coastwise traffic so as to reflect the prescribed minimum differences or "differentials" therein as related to the corresponding rates contemporaneously in effect to and from Galveston.

Since the Commission did not revoke its declaration that the Texas & Pacific is not to be considered as a part of the Missouri Pacific system, and since no contention was made at any time that the Louisiana Railway & Navigation (now Louisiana & Arkansas) system is controlled by any other carrier, and since the Commission further did not in its 1929 report revoke its previous conclusion that neither of those carriers has any

"controlling voice" in fixing the level of the assailed rates to any of the Texas ports, our next inquiry is to ascertain upon what ground or principle the Commission bases the ultimate finding in its 1929 report of the existence of undue preference and prejudice with respect to the rates to and from points on the lines of those carriers.

Our Fourth Proposition consequently addresses itself squarely to the legality of the 1929 order of the Commission, and the sufficiency of the evidence to support it.

After pointing out on page 355 of its 1929 report (R. 3451) that the *domestic* rates "on almost all commodities, including most of those dealt with in this proceeding, have been placed upon a basis which reflects distance to a much greater extent than theretofore," this in order to remove "the numerous instances of undue prejudice found to exist in the Southwest," the Commission continued thus:

> "The policy of the New Orleans carriers of equalizing their rates to New Orleans with those to the Texas ports, carried to the length indicated in this and the previous report, runs counter to this purpose in that, instead of giving substantial weight to distance as a factor in determining rate relationships, the tendency of these carriers has been to give increasing weight to competition and less to the factor of distance.
>
> "The foregoing facts, supplemental to many others set forth in the previous report, point to a clear

> case of undue prejudice for the New Orleans carriers against Galveston and other Texas ports taking the same rates and undue preference of New Orleans. The remaining question is whether, as a matter of law, the New Orleans carriers can be found guilty of undue prejudice under the circumstances confronting us in these cases, both of which present the same question of law."

Thereupon, in the next succeeding paragraph (R. 3452) there appears the following:

> "The New Orleans carriers participate in a full line of joint commodity rates to and from gulf ports from and to both the junction and local points on their lines. While, under the rules governing the southwestern carriers and their tariff-publishing agents, the New Orleans carriers have the power to increase the rates from points served by them to the Texas ports without concurrence of their connections, a reduction in such rates would require the consent and concurrence of the participating Texas lines. With a few exceptions not here important, the rates between points on the lines of the New Orleans carriers, on the one hand, and the nearest Texas port, on the other, on all of the commodities in respect of which relationships were prescribed in the previous report to or from Texas points, are on bases the same [as] or lower than prescribed or approved by us. Under these circumstances, can the New Orleans carriers be held liable for undue prejudice?"

Next follows a review of the doctrine adopted by the Commission in 1911 in *Ashland Fire Brick Co.* v. *S. Ry. Co.*, *supra*, and until recently followed.

This doctrine is to the effect that undue preference and prejudice under § 3 of the act can not be found to exist unless the same carrier or carriers is or are responsible for both the alleged preference and prejudice and that the Commission can, by an alternative order, require such carrier to remove the alleged preference and prejudice, at least in the absence of a finding that the higher rate complained of is in itself unreasonable. The Commission then discusses several of the decisions of this Court, whereupon it reaches the following conclusion (R. 3454-55):

> "The foregoing expressions by the Supreme Court leave no room for doubt that the construction of our powers under § 3(1) of the act as announced in *Ashland Fire Brick Co.* v. *S. Ry. Co.*, *supra*, is too narrow, and that in the situations before us in the instant cases we have the power to require the New Orleans carriers to remove the undue prejudice herein found to exist."

We thus see, so far as the Commission's 1929 decision is concerned, that the issue is whether the New Orleans carriers, *i. e.*, the Texas & Pacific and the present Louisiana & Arkansas system lines, shall be permitted to participate in the handling of the traffic moving through the

ports *to and from points on their own rails*, and to continue to serve *the communities directly reached by them*, on an equality of opportunity as to rates with the competing lines which reach one or more of the Texas ports, or whether the former, by having an arbitrary and unnatural rate adjustment forced upon them, shall be prohibited from competing with such other lines for a fair proportion of the traffic in question.

Or, stated otherwise, the question is whether, by the unwarranted fiat of the Commission, the Texas port lines shall be given a monopoly of the handling of such traffic and the New Orleans lines excluded from participating therein on an equality of opportunity. The question naturally divides itself into two phases, first, with reference to traffic to and from junction points with lines serving the Texas ports, either directly or through their connections, and, secondly, with reference to traffic to and from local points on the New Orleans lines, as to which they necessarily participate in the rates from and to the Texas ports.

It is obvious that the New Orleans lines have no effective control whatever over the rates between their junction points with the Texas port lines and the Texas ports. Indeed, it was admitted by representatives of the Texas port lines supporting the complaint (R. 3105, 3116, 3143-44) that the Texas port lines could reduce the rates to and from the Texas ports without the concur-

rence of the New Orleans lines, but that no reduction could be made in such rates by the New Orleans lines, even as to their local stations, without the concurrence of one or more of the lines reaching the Texas ports; in fact, it was testified (R. 3089, 3112) that the Texas port lines flatly refused to join the New Orleans lines in any reduction of the prescribed rates on cottonseed cake and meal to the Texas ports. On the contrary, where maximum reasonable rates have been prescribed, either by state or interstate authority, none of the carriers is privileged to publish rates higher than those so prescribed.

With particular regard to the local points on the New Orleans lines, it is true, as stated by the Commission, that they participate in a full line of joint commodity rates to and from the gulf ports. But this they are compelled to do under the requirements of the Commission's order entered pursuant to paragraph (4) of § 1 of the Interstate Commerce Act, which directs, in part, that common carriers subject thereto shall establish through routes and just and reasonable charges applicable thereto. The rates so required, however, may not (a) exceed those fixed as reasonable maxima by either state or interstate authority, nor (b) be lower than their connections serving the Texas ports will agree to, and we have seen

that in at least one instance they refused to join in rates lower than the prescribed maxima. Hence, the compulsory participation by the New Orleans carriers in rates to and from the Texas ports has no legal significance whatever. *Central R. R. Co.* v. *United States*, *supra*, at page 259.

This leads us to a consideration of the principle adopted by the Commission in the *Ashland case* referred to above. The situation there involved will readily be appreciated by reference to the map on page 116 of the Commission's report. The gravamen of the complaint in that case was, in part, that the rates on brick to Birmingham, Ala., from St. Louis, Mo., and from complainant's kilns in Ohio and Kentucky, *e. g.*, Ashland, were unduly preferential of shippers in St. Louis and unduly prejudicial to the complainant. As stated by the Commission (page 120), St. Louis may reach the Birmingham district over the lines of the St. Louis-San Francisco or the Mobile & Ohio alone, but neither of those lines serves Ashland; also, while the Chesapeake & Ohio serves the Ashland kilns, it neither directly nor indirectly serves those of St. Louis. Under these circumstances, the Commission said (pp. 120-121):

> "To be sure the Louisville & Nashville in connection with the Chesapeake & Ohio forms a through route from Ashland to Birmingham and also has a through route of its own from St. Louis; but—and

> this is the important condition—the Ashland brick could move to Birmingham without the intervention of the Louisville & Nashville by way of the Chesapeake & Ohio and the Queen & Crescent roads, none of which are vital to a movement from St. Louis. Thus we see that by withdrawing from the St. Louis business the Louisville & Nashville could not put an end to the preference in favor of St. Louis or give relief to Ashland."

Confronted with the foregoing facts, the Commission defined the limits of its powers thus (pp. 119-20):

> "In so far as this case is predicated upon the discrimination of the carriers out of St. Louis the Commission may not within its lawful power reduce the rates from the Ashland-Olive Hill district. * * * For its own purposes as a competing line, and serving a distinct point of origin which desired access into the markets of the South, the Frisco road made these rates. This is a matter of traffic policy over which we have no control so long as the carrier adopting such policy does not discriminate as between communities. * * * It does not lie with this commission to say that a carrier may not do this, nor can we reduce rates from other points because of such competition."

As stated by the Commission in its 1929 report herein, this doctrine was adhered to for a period of almost twenty years, and in reality it existed long prior to 1911, but a majority of the Commission has now decided, on the strength of *its own interpretation* of certain decisions of

this Court, that its conclusions in the *Ashland case* were erroneous. It behooves us, therefore, to determine whether the Commission has placed a correct interpretation upon the meaning of the language employed by this Court in the decisions cited by the Commission in its 1929 report herein.

St. Louis S. W. Ry Co. v. *United States*, 245 U. S. 136, cited both by the Commission and by the trial court (R. 3453, 3579), grew out of an order of the Commission finding unreasonable a group rate of 22 cents on lumber from the Southwest to Paducah, Ky., to the extent that it exceeded the group rate of 16 cents then in effect from the same origin territory to Cairo, Ill. The Commission found that the distances to Paducah via the Memphis gateway were approximately the same as to Cairo. Via two of the principal southwestern lines the 22-cent rate to Paducah applied only via the Cairo gateway in connection with the Illinois Central beyond, but via the third principal southwestern line it applied through Memphis in connection with the Illinois Central beyond. In prescribing the 16-cent rate to Paducah, however, the Commission did not limit its application to the route via Memphis, which point was reached by the rails of all three of said principal southwestern lines, but left it optional with the carriers to apply same via Memphis or via the longer routes through Cairo.

It is true, as stated in the Commission's 1929 report herein, that its order in the *Paducah case* left the carriers no alternative as to whether they should increase the Cairo rate or reduce the Paducah rate, but this was because the Commission prescribed the then-existing Cairo rate as a reasonable maximum to Paducah, and that was really the only issue in the case. As was later very appropriately observed by this Court in *Central R. R. Co.* v. *United States*, *supra*, at page 258:

> "Congress could not have intended that under such circumstances relief should be afforded under § 3, when a direct remedy is available under § 1."

Had the Commission simply made a finding of undue prejudice as to Paducah by reason of the maintenance of the lower rate to Cairo, an altogether different situation would have been presented. In fact, while the injury which superinduced the filing of the complaint with the Commission, as this Court pointed out at the close of its opinion, was doubtless attributable to the existence of the lower rate to Cairo, the Court specifically declared that—

> "* * * the order is strictly one under § 15 of the Act to Regulate Commerce to reduce existing through rates by establishing joint rates or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of § 3."

So far from there being any analogy between the foregoing case and the one at bar, we have here an instance where the appellant New Orleans carriers are seeking to maintain via the optional route through the New Orleans gateway an equality of through rates (*i. e.*, the sum of the rail-and-water rates) contemporaneously applying via competitive routes operated through one or another of the Texas ports. This, however, the Commission has undertaken to prohibit, nothwithstanding the fact that in most instances (R. 737-39, including Exhibit 131; R. 915-17, including Exhibit A-14; R. 3283-84, including Exhibit B-92) the through rail-and-water distance via New Orleans is considerably less than via Galveston, and this is generally true even as to points from which the rail distance to New Orleans exceeds that to Galveston. Thus, from Fort Worth, Tex., to Key West, Fla., and hence to all European and eastern destinations via water routes operated through the Florida Straits (see Exhibit 131, R. 738), the distance is 1178 statute miles via New Orleans (Westwego), as contrasted with a distance of 1246 statute miles via Galveston.

The Commission next cites in its 1929 report its decision in *York Mfrs. Asso.* v. *P. R. R. Co.*, 107 I. C. C. 219, 231. Its decision in that case, however, is based upon a ruling there quoted from *Arkansas Jobbers & Mfrs.* v. *Director General*, 59 Inters. Com. Rep. 662, 669, to the

effect that, as amended in 1920, the Interstate Commerce Act empowers the Commission "to prescribe either the exact rate or the maximum or minimum or maximum and minimum" to be charged where findings of undue preference and prejudice are made. In the case at bar, however, there is involved no issue relating to the "mimimum rate" powers of the Commission, in view of its declaration that the controversial rail rates to and from New Orleans were not shown to be so low as to throw a burden upon other traffic. The foregoing citation is not at all in point.

Central R. R. Co. v. *United States*, *supra*, also cited both by the Commission and by a majority of the trial court, as well as in the dissenting opinion of Judge Foster (R. 3582), brought in issue an order of the Commission requiring the appellant carriers to remove a discrimination found to exist under § 3 by reason of the allowance by other carriers of a creosoting-in-transit privilege on shipments of forest products. As observed by the Court, the Commission made no finding of unreasonableness under § 1, nor did it direct the carriers that maintained the transit privilege to discontinue same. After pointing out the inability of the appellant carriers to control the practice of other carriers as to the allowance of this transit privilege, the Court said at page 258 with respect to the former:

> "But to do so would involve departure from a policy to which they have steadfastly adhered and

adhesion to which was held by the Commission not to be unreasonable. If they should establish the privilege at Newark, they would act contrary to their judgment and would adopt a practice which some connecting carriers had introduced without their concurrence or consent, and which may hereafter, upon appropriate enquiry, be held by the Commission to be unjust and unreasonable. Congress could not have intended that under such circumstances relief should be afforded under § 3, when a direct remedy is available under § 1."

In the case at bar, the Commission has found that the equalized rail rates maintained by the New Orleans carriers to and from that port are more than compensatory, which finding is abundantly borne out by the evidence, as will be hereinafter more fully discussed, but has nevertheless entered an order prohibiting such carriers from further continuing their long-established policy of maintaining the port of New Orleans on a rate parity with the Texas ports as to the traffic involved herein, and thereby prohibiting them from sharing in the handling of such traffic on an equality of opportunity with competing lines operating through the Texas ports. As a matter of fact, in the Court's opinion in the above case we find express approval of the practice of the appellant carriers in maintaining rates to and from New Orleans as to foreign and coastwise traffic the same as the rates contemporaneously maintained to

and from the Texas ports on such traffic in which they are participating carriers. Thus, at page 259, it is said:

> "But participation merely in joint rates does not make connecting carriers partners. They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a *lower* joint rate is given to one locality than to another similarly situated. *Penn. Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221, 222, 225." (Emphasis ours.)

The Commission further cites and quotes from *Chicago, I. & L. R. Co.* v. *United States*, 270 U. S. 287. But here again, at pages 292-93, the Court stated that the Commission's order therein under review left the complaining carriers "free to remove the discrimination [found by the Commission to exist] by any appropriate action." Finally, both the Commission and the trial court cite *United States* v. *Illinois Cent. Railroad*, 263 U. S. 515. There the complaint related to the maintenance of a rate on lumber from Knoxo, a local point on a short-line connection of the Illinois Central that was higher than a group or "blanket" rate on lumber applying from surrounding points generally. Thus, there was involved in that case a *disparity* in rates applying on traffic from points in the same general locality, rather than an

equality of rates, such as is herein under review. The same is true of the companion case decided by this Court at the same time, *Wyoming R. R. Co.* v. *United States*, also referred to in the Commission's 1929 report, except that the points found by the Commission to be unduly prejudiced were destinations on a short-line connection of the Chicago, Burlington & Quincy.

The fact is that the decision of the Commission in the cases under review, as well as that of the Court, turned upon the proposition that the trunk lines, *i. e.*, the Illinois Central and the Burlington, were in control of the rate adjustment to which the complaints in question were directed. In other words, to make use of a happy term employed by Commissioner Aitchison at page 2197 of the oral argument before Division 2 in 1924 (sent up as an original exhibit), the purport of the foregoing decisions was that these two trunk lines were the "common violators" of § 3, and hence it was within their power to remove the cause for complaint, either by extending the respective "blanket" rates to all their short-line connections or else by putting the preferred points on a higher basis than the blanket rate.

The apparent, or at least inferential, object of the Commission in citing and reviewing the foregoing decisions was to support the proposition that, by participation in rates or practices found to create undue prefer-

ence and prejudice, a carrier may be held responsible therefor, even though it does not with its own rails serve the point or locality found to have been injured. The Commission further tacitly assumed as a postulate, however, that mere participation in joint through rates is sufficient in itself to support a finding of undue prejudice against such carriers. But such a postulate is directly contrary to the holding of this Court in *Central R. R. Co.* v. *United States, supra.*

For a rate or practice to give rise to undue preference and prejudice, it must be shown to be unreasonable or unlawful in some respect, but here there was no issue before the Commission concerning the reasonableness of the rates to and from either New Orleans or the Texas ports, and we have the Commission's express declaration that the rates for the longer hauls to New Orleans can not be found to be so low as to throw a burden upon other traffic. In repeated decisions of this Court it has been held that, so long as it does not contravene the law in some respect, a carrier is free to initiate its own rates and rate policies. To say that this appellant is not at liberty to make rates within the upper and nether bounds of reasonableness which will enable it to make full use of its property for the benefit of shippers and communities located along its line of railway is to deprive it, to that extent, of the exercise of managerial discretion and of the use of its property, this by trans-

ferring the control of its port rates to the Santa Fe and other Texas port lines, in violation of its constitutional rights. This, however, will form the subject of a subsequent proposition.

In point of fact, the effect of the 1929 order of the Commission is to put the Texas & Pacific in a "straight jacket" with respect to the making of rates to apply on traffic destined for export, import, or coastwise movement, and to leave it no voice whatsoever in the making of rates which will enable it to continue to participate in the handling of such traffic. True, the 1929 order of the Commission purports to leave the carriers free to remove the alleged undue preference and prejudice by either increasing the New Orleans rates or reducing the rates to and from the Texas ports. But this inferred choice of action is in fact altogether spurious and chimerical; what is held up to view by the Commission is no more substantial than a mirage; as this Court sagely but incisively observed in *Central R. R. Co.* v. *United States*, *supra*, at page 258, the "alleged alternative is illusory."

As the order is worded, it does not specifically require that the New Orleans rates be increased, but at the same time the New Orleans carriers are powerless to

compel a reduction of the rates to and from the Texas ports. The inescapable fact remains that, irrespective of which alternative the carriers might elect to adopt, the effect of the Commission's order is to deprive the New Orleans carriers of an opportunity to compete for the business on equal terms with the Texas port lines. The consequence is a rigid and congealed rate structure totally unsuited to the flexible needs of commerce.

Thus, under the limitations imposed by the Commission, should the opportunity arise for the Texas & Pacific to handle a given consignment which the shipper desires to move through the port of New Orleans provided a satisfactory rate could be established, the Texas & Pacific is debarred from establishing a rate thereon below a figure arbitrarily higher than the existing rate to Galveston or to any of the other Texas ports; or in any event, even were the Texas & Pacific able to reduce its existing rate to New Orleans, the requirements of the Commission's 1929 order would automatically compel a contemporaneous reduction of the corresponding rate to Galveston so as to preserve the minimum "differential" relation therein prescribed.

A practical illustration will be helpful. Let us again take the case of a large consignment of cottonseed cake to Antwerp from a cottonseed oil mill located exclusively on the tracks of this appellant at Dallas. We have seen that the prevailing ocean rate is the same from New Or-

leans as from the Texas ports, and that the traffic will move over the line of least resistance; that is to say, via the route by which the lowest transportation charges are available. Hence, so long as the Commission's fiat is permitted to stand, appellant will be compelled to maintain for shipside delivery at New Orleans a higher rate on such traffic than that contemporaneously applying for shipside delivery at Galveston at least to the extent of the prescribed "differential," thereby resulting in a higher *through* rate from Dallas to Antwerp by way of New Orleans than that applying by way of Galveston, and the rate difference is yet greater as to some traffic by way of the intermediate inland ports, Houston for example, to which port, as we have already seen, an even lower export rate on cottonseed cake applies

Inasmuch as there are several lines of railway extending directly from Dallas to both Houston and Galveston, including two of the appellee carriers herein, it is obvious that this appellant, to all practical intents and purposes, is absolutely debarred from competing with the Texas port lines in the handling of such export traffic. Even should it be possible to induce the aforesaid shipper to route his export shipment via the Texas & Pacific to Fort Worth, say, and thence by way of another line reaching Houston or Galveston, a somewhat round-about route, appellant at most would receive only a division or fraction of the through rate, and would be

altogether deprived of the use of its 500 miles of track from Dallas to New Orleans and of its terminal facilities at the latter terminal, so far as the shipment in question is concerned. That such a consummation is not within the scope and design of the Interstate Commerce Act is clearly perceptible, we believe, from the following observation of this court in the so-called *Import Rate Case*, 162 U. S. 187, *supra*, at page 219:

> "Commerce, in its largest sense, must be deemed to be one of the most important subjects of legislation, and an intention to promote and facilitate it, and not to hamper or destroy it, is naturally attributed to Congress."

Before passing to our next proposition, we desire to direct the Court's attention to two cases, one decided before and the other after the Commission's decisions in the case at bar, wherein on substantially identical facts and conditions the Commission's findings and holdings were directly contrary to its action herein. The first of these is *Maritime Asso., Boston Chamber of Commerce*, v. *A. A. R. R. Co.*, 95 Inters. Com. Rep. 539, decided February 3, 1925, or approximately a year after the opinion of this Court in *United States* v. *Illinois Cent. R. R.*, *supra*, was handed down. The complaint in that case was with reference to the rail rates on export and import traffic to and from Boston and other New England ports as re-

lated to the corresponding export and import rail rates to and from other Atlantic ports, particularly New York, Philadelphia and Baltimore. In the course of its opinion, the Commission in part said (page 565):

> "We have no arbitrary power to do what may seem to be in the public interest, but only such powers as are conferred by statute, and here our only duty is to determine whether the rates under attack are unreasonably high or low and whether they unduly prejudice the New England ports and unduly prefer the other ports named."

And immediately thereafter:

> "These competitive influences are frequently encountered and explain many of the situations which complainants have brought to our attention where rates and distances are out of accord. The situation at Hampton Roads may be taken as an illustration. The distances from points in differential territory to Norfolk are in general considerably greater than they are to Baltimore, yet to a large extent the export rates and the domestic rates, and to a lesser extent the import rates, are the same to both ports. This comes about because the Chesapeake & Ohio and the Norfolk & Western, particularly the former, have direct lines to Norfolk from certain points in differential territory and do not serve Baltimore, except in connection with circuitous routes. If they constituted or participated in rate-making routes to Baltimore as well as to Norfolk, we might, upon complaint, require greater observance of distance in the rates to these ports. Having no control over the Baltimore rates, they may

> equalize these rates at Norfolk without being guilty of unduly preferring Norfolk over Baltimore. We have held that we can not prohibit carriers from meeting competition in this way so long as they are not guilty of undue preference and prejudice and so long as they do not charge rates which are so unreasonably low that they burden other traffic. On the other hand, we can not require carriers to meet competition."

Further on, there appears on pages 572-73 the following:

> "A more serious objection is the fact that the New York Central, which is the rate-making line from Buffalo to Boston, is not the rate-making line from Buffalo to either Philadelphia or Baltimore. It can not control the rates to those north Atlantic ports. Nor can the carriers which operate over the direct rate-making routes to Philadelphia or Baltimore control the rates from Buffalo to Boston. In such a situation it is claimed, and we think correctly, that it is impossible to find that defendants, or any of them, unduly prefer Baltimore and Philadelphia over Boston to the undue prejudice of the latter."

The other case to which we have reference is a decision rendered by the Commission in passing upon Fourth Section Application No. 2040 et al., entitled *Export and Import Rates to and from South Atlantic and Gulf Ports*, 169 Inters. Com. Rep. 13. The date of the Commission's report in that case is December 2, 1930, approximately a

year after the rendition of its 1929 report and order herein, and some six months subsequent to the date the trial court's opinion was rendered in this proceeding. The fourth section applications before the Commission in the case in question sought authority, *inter alia*, to publish export and import rates between the south Atlantic and gulf ports, on the one hand, and certain interior points, such as Chicago and St. Louis, on the other hand, and at the same time to maintain higher rates between such ports and intermediate points in the interior. The justification for the fourth-section relief so sought and by a permissive order allowed was the existence of lower rates via competitive routes between the north Atlantic ports, such as New York, Philadelphia, and Baltimore, and the interior points as to which the applicant carriers were desirous of publishing and observing the lower rates. Thus, at page 32, the Commission said:

> "The necessity of establishing an adjustment of rates which will enable foreign commerce to move freely through southern ports as well as through the north Atlantic ports from and to the interior territory is offered as the general justification for the relief prayed herein by all the carriers serving the southern ports. Special justification offered by some of those carriers in individual situations will be discussed separately."

And on pages 44-45:

> "There is no doubt that any increase in the movement of foreign commerce to and from the interior

territory via the southern ports would be accompanied by a corresponding relative decrease in the movement through the northern ports. However, unless the rates which produce this result are unduly preferential or unduly prejudicial or otherwise in violation of law, or contrary to the general public interest, as expressed in the law, the fact that they may divert traffic from one port or group of ports to another is no bar to the granting of fourth-section relief. * * * We have adopted the view in the administration of that section that relief from the provisions thereof should be granted where competitive conditions must be met by one carrier in order to retain or secure traffic which otherwise would move over another route, provided the rates established for that purpose do not conflict with other provisions of the act, and are not contrary to the public interest. There is no sound reason why that policy should not be followed in this case."

We submit that, in permissively granting the fourth-section relief so sought by the carriers serving the south Atlantic and gulf ports to enable them to compete with the lines serving the north Atlantic ports in the handling of competitive export and import traffic moving from and to the interior territory served in common by the two sets of carriers, either directly or indirectly, the Commission leaned as far forward as it previously leaned backward in undertaking by a positive and affirmative order, and in addition by a denial of fourth-section relief on even a very limited scale, to deny the carriers serving the port of New Orleans the right to compete on

an equality of rates with the carriers serving the Texas ports as to the foreign and coastwise traffic with which this proceeding is concerned.

We appreciate the fact that the foregoing decision does not appertain directly to the third section, but in certain respects it bears a close analogy to the case at bar, since it grew out of the efforts of the carriers serving what might be termed one group of ports to shrink their rates on export and import traffic below the level normally applying on domestic traffic in order to enable them to compete with the northern lines serving another group of ports. The position of these northern lines was substantially the same as that of the Texas port lines in this case, in that they were the rate-making carriers to and from the points in the interior producing and consuming territory, and they bitterly contested the efforts of the southern lines to obtain the fourth-section relief that would enable them to establish competitive rates on the traffic in question.

In these respects, we say that, in according to the southern carriers a grant of fourth-section relief in that case the Commission necessarily put itself in the position of saying that neither undue preference of the southern ports nor undue prejudice to the northern ports would result from a disregard of distance and unfavorable transportation conditions by the lines constituting

the southern routes, that being identical with the position of this appellant as to the situation involved in this case. We might further direct attention to the Commission's recent decision in *Cement in Trunk-line Territory*, 174 Inters. Com. Rep. 224, in which fourth-section relief was sought as to a rate adjustment on cement which was therein found (page 227) to be in conformity with both §§ 1 and 3. In entering an order providing for fourth-section relief, the Commission in part remarked *(id.)* that, "The various sections of the act should be construed together so as to result in a consistent and harmonious interpretation of the whole."

One of the principal carriers operating between this common interior territory and the southern ports is the Illinois Central, which has a direct line extending from New Orleans to Chicago, and thence as far west as Omaha, Neb. We therefore have in the decision of the Commission on the fourth section applications referred to above a substantially identical situation to that previously before the Commission in *New York Board of Trade & Transportation* v. *Pennsylvania R. Co.*, 3 Inters. Com. Rep. 417, 421. It was in the latter proceeding that the Commission entered the order later brought before this Court in the *Import Rate Case*, *supra*, in the

course of which, at pages 234-35, the Court commented upon the Commission's report thus:

> "It is stated in that report that the Illinois Central Railroad Company, one of the respondents in the proceeding before the Commission, averred in its answer that it was constrained, by its obedience to the order of March, 1889, to decline to take for shipment any import traffic, and, to its great detriment, to refrain from the business, for the reason that to meet the action of the competing lines it would have to make a less rate on the import than on the domestic traffic.
>
> "Upon this disclosure that their order had resulted in depriving that company of a valuable part of its traffic (to say nothing of its necessary effect in increasing the charges to be finally paid by the consumers), the Commission in its report naively remarks: 'This lets the Illinois Central Railway Company out.' 4 Interstate Com. Com. Rep. 458."

FIFTH PROPOSITION

The law confers upon the Commission no power or authority to manipulate rates so as to counteract any natural or commercial advantages (whether real or fancied) which the port of New Orleans and other Louisiana ports may have over the port of Galveston and adjacent Texas ports, and thereby artificially divert the movement of traffic away from the former and the carriers serving them and to the latter and the carriers serving them.

(Germane to Assignments Nos. 11, 13d, 13f, 13h, 14, 23 and 24.)

Sou. Pac. Co. v. *Interstate Commerce Commission, supra;*

Interstate Commerce Commission v. *Diffenbaugh, supra;*

Ellis v. *Interstate Commerce Commission*, 237 U. S. 434, 445;

Atchison, T. & S. F. Ry. Co. v. *Interstate Commerce Commission*, 190 Fed. 591, 594.

Anchor Coal Co. v. *United States*, 25 Fed. (2d) 462, 470-71.

As we shall hereinafter point out, Galveston and the other Texas gulf ports have many concrete and substantial natural advantages over the port of New Orleans, so far as the interior origin and destination territory with which we are here dealing is concerned, which ad-

vantages fully offset such natural advantages, if any, as may inhere in the latter port and not in the former. In its reports herein, however, the Commission has seen fit to ignore the natural advantages which accrue to the Texas gulf ports, and on the contrary has based its various decisions largely upon the imputed existence of natural advantages which it has been persuaded are enjoyed by New Orleans over Galveston. Thus, on page 121 of its 1925 report (R. 3360), we find the following observations:

> "New Orleans has certain natural advantages over Galveston which have affected the relationship of rates to the two ports. It is situated on the Mississippi River, a natural division between, and terminus of, lines operating both east and west thereof. It therefore draws freight from both east and west of the river and by barge line down the river, which insures it not only a greater volume but a wider variety of freight than goes to Galveston, which is dependent upon the southwestern lines. This fact in itself warrants careful scrutiny of a rate adjustment which is alleged to be unduly prejudicial to the port least favored by natural advantages. While those natural advantages are entitled to consideration in so far as they have been brought about by geographical location, they are not entitled to much respect in so far as they have been brought about by rate advantages such as those here complained of. So far as the territory west of the Mississippi River, which we are here considering, is concerned, the difference between the natural advantages of New Orleans and Galveston is small. Both ports are natural objectives for export and coastwise

freight originating in that territory. * * * The policy of the southwestern carriers serving New Orleans, more particularly the Texas & Pacific, has been, generally speaking, to apply the Galveston rates to New Orleans on traffic moving from or to all points west of the Mississippi River, except points in Texas south of the Texas & Pacific. Such an adjustment necessarily disregards distance and commercial instead of natural advantages control. We have consistently refused to condemn such an adjustment where it is shown to serve the best interests of the public, but where, as here, it builds up one port at the expense of another equally favored by natural advantages from the origin territory here considered, a line must be found beyond which distance may not be disregarded."

Similar expressions appear on pages 366-67 of the Commission's 1927 report (R. 3388-89), and on pages 368-69 (R. 3391) the Commission thereupon expresses the following conclusions:

"While such commercial advantages as are above enumerated can not be determinative of rate relationships, and few of them can be taken into consideration in passing upon the question of undue prejudice, they serve to confirm the impression that the advantages of New Orleans, whether natural or acquired by progressive enterprise, are so superior to those of the Texas ports that an affirmance of the findings in the original report would not be likely to cause serious injury to the port of New Orleans.

* * *

"* * * Healthy competition is no less important between ports than between rail or water carriers. There is, however, a limit beyond which the disregard by rail carriers of the geographical advantages of one port in favor of another will impair rather than promote healthy competition between the ports. There is much ground for believing that a policy of port equalization, if carried beyond reasonable limits, has the effect of strengthening unduly, at the expense of others, those ports which by reason of natural or acquired advantages have attained commanding positions in the export and import trade."

Further comment along the same lines is found at pages 348-49 of the Commission's 1929 report in the same proceeding (R. 3443), from all of which it is readily self-evident that, in denying the carriers, including this appellant, the right to maintain the port of New Orleans on a rate parity with the Texas ports as to foreign and coastwise traffic moving through the ports, the Commission was prompted by a desire to nullify the *natural advantages* so imputed by it to the port of New Orleans. Such action on the part of the Commission, however, runs directly counter to the following declaration of this Court in *Interstate Com. Comm.* v. *Diffenbaugh*, 222 U. S. 42, 46, as to the limitations that are imposed upon the scope of its functions and authority:

"We agree with the court below that this decision is erroneous in its conception of the grounds on

> which under the statute an advantage may be pronounced undue, and in its assumption that Congress has left the matter open by merely permissive words. The principle as to advantages is recognized in *Penn Refining Co.* v. *Western New York & Pennsylvania R. R. Co.*, 208 U. S. 208, 221. The law does not attempt to equalize fortune, opportunities or abilities."

And later, citing the foregoing case as its authority, this Court again declared in *Ellis* v. *Int. Com. Comm.*, 237 U. S. 434, at page 445, that, "* * * it is to be observed that not every advantage that may enure to a shipper as the result of the position of his plant, his ownership or his wealth is a preference."

Neither can the Commission base rates or differentials upon industrial conditions. See *Anchor Coal Co.* v. *United States*, 25 Fed. (2d) 462, 470-71. This was a case where the Commission undertook to fix differentials higher from one coal-producing center than from another. The effect of fixing these higher differentials was prohibitory of the movement. The Court said, after summing up the findings of the Commission, that:

> "It is perfectly evident from a study of the foregoing reports of the Commission that, in reducing the rates from the northern field, and in directing the cancellation of the reduction from the southern field, the Commission was primarily concerned, not

in fixing rates, but in fixing the differential which was to prevail between the two fields, and that, in expanding the differential to 45 cents and in refusing to allow the old differential of 25 cents to be restored, the Commission based its action upon the shift of tonnage from the northern to the southern field and the industrial conditions resulting therefrom. That this was the basis of the Commission's action appears not only from the language of the reports which we have quoted, but also from an analysis of the existing situation and the necessary effect of the order. The rates proposed were not so low as to burden other traffic or prevent the carriers realizing a reasonable return on invested capital or value, and the Commission did not order their cancellation on any such ground. Even after the reduction they would be 25 cents higher than the rates from the northern field; consequently, considered independently of such matters as the cost of production of coal, they could not have interfered with the traffic of roads having a rate 25 cents per ton lower. The only way in which they could be said to interfere with the traffic from the northern field, would be that on account of the difference in industrial conditions in the two fields, the southern field would be able to undersell and get the business even though paying a rate 25 cents per ton higher, whereas it would not be able to undersell if the differential were made higher than that. But it must be manifest that increasing the differential to meet such a situation is not regulation of rates, but regulation of industrial conditions under the guise of regulating rates. It means nothing more nor less than that, because one community is able to produce coal more cheaply than another, and thereby get a large share of the business which has been going to

the other, even though paying a considerable differential in freight, the Commission is placing upon it a handicap by increasing the differential in rates and thereby equalizing the advantage which it has in a low cost of production. It matters not what this may be called, it is in essence a regulation of industrial conditions through manipulation of rates.

"It is said that the increase of the differential resulting from the lowering of the rates from the northern field and the cancellation of the reduced rates from the southern field is justified by the longer haul from the southern field; but rates are not fixed upon a mileage basis, and the rate for the longer haul, if higher than the rates of competing roads or rates from competing communities, can not of consequence to any one except the carriers concerned, unless they result in such impairment of earnings as to make the rates unreasonably low *per se*; that is, so low as not to yield a reasonable return upon the investment of the carrier or throw an undue burden upon other traffic. The Commission recognizes that length of haul is not in itself a sufficient reason for increasing the differential or refusing a reduction which would leave the rate higher than rates from competing communities, and comes back to the proposition that the change is justified because of conditions in such communities. In a passage previously quoted it says: 'In competitive adjustments the carriers may disregard distance, even in substantial degree, so long as the competitor whose geographical location is largely disregarded is not injured thereby; but where it is made to appear in an interrelated adjustment, such as that with which we are here dealing, that such a competitor is injured and is complaining, we believe that a proper interpretation of the law which we administer de-

> mands a remedy.' How could a competitor who is complaining be injured by a rate higher than his rate? The question answers itself. He could not be injured by the higher rate. If there be injury, it is because of difference in other conditions, not rates; and if the differential be increased in favor of the community enjoying the lower rates, it is not the baneful effect of rates which is removed, but the effect of unequal industrial conditions, which is obviated by increasing the difference in rates in favor of the community already enjoying the lower rate."

To somewhat the same effect is the following paragraph taken from the decision of the erstwhile Commerce Court in *Atchison, T. & S. F. Ry. Co.* v. *Interstate Commerce Commission*, 190 Fed. 591, 594:

> "The authority granted it under section 15 of the act to regulate commerce to prescribe reasonable rates when it shall be of the opinion that the rates fixed by the carrier are unreasonable does not confer absolute or arbitrary power to act on any considerations which the Commission may deem best for the public, the shipper, and the carrier. Its order must be based on transportation considerations. While it may give weight to all factors bearing either on the cost or the value of the transportation services, it must disregard as well the demand of the shipper for protection from legitimate competition, domestic or foreign, for unlimited markets, or for the enforcement of equitable estoppels arising from a justifiable expecation that past rates will be maintained, as the demand of the carrier for the maximum rate under which the traffic will move freely."

This thought is otherwise expressed thus in *United States* v. *Illinois Cent. R. Co.*, *supra*, at page 524:

> "To bring a difference in rates within the prohibition of § 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard."

It is highly significant, we believe, if we may here insinuate a parenthetical comment, that it is tacitly assumed by the Court that any infraction of the terms of § 3 calls for at least a *difference* in rates as a starting point, and even with that to begin with other facts must be established to prove that the discrimination is unjust.

SIXTH PROPOSITION

Since the established legislative policy of the Congress is to promote and maintain freedom of competition in commerce, the refusal of the Commission to give consideration to the competitive nature of the traffic herein under review, and to all the circumstances and conditions attendant thereupon, including the water rates beyond the ports, is contrary to the requirements of the law.

(Germane to Assignments Nos. 13a, 13b, 13c, 13d, 13j and 14.)

Texas & Pacific R. Co. v. *Interstate Commerce Commission* (the *Import Rate case*), 162 U. S. 197, 205, 207, 217, 218-19, *supra*;

Interstate Commerce Commission v. *Ala. Mid. R. Co.*, 168 U. S. 144, 164-65;

Louisville & N. R. Co. v. *Behlmer*, 175 U. S. 648, 670-71.

East Tenn., V. & G. R. Co. v. *Interstate Commerce Commission*, *supra*;

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 190 U. S. 273;

Sou. Pac. Co. v. *Interstate Commerce Commission*, 200 U. S. 536, 552;

Interstate Commerce Commission v. *Chicago G. W. R. Co.*, 209 U. S. 108, *supra*;

Intermountain Rate Cases, 234 U. S. 476, 482;

Interstate Commerce Commission v. *Baltimore & O. R. Co.*, 225 U. S. 326, 346;

Skinner & Eddy Corp. v. *United States*, *supra*;

Interstate Commerce Commission v. *Clyde S. S. Co.*, 93 Fed. 83;

Interstate Commerce Commission v. *Chicago G. W. R. Co.*, 141 Fed. 1003, 1014, 1016, 1018;

Maritime Asso., Boston Chamber of Commerce, v. *A. A. R. R. Co.*, 95 Inters. Com. Rep. 539, 565-67;

The Hoch-Smith Resolution, 43 Stat. L. 801, U. S. C., Tit. 49, § 55;

Judson on Interstate Commerce, § 175-183;

In the Commission's 1927 report (R. 3387) the statement is made (page 365) that the maximum ocean rates are fixed by the Gulf Shipping Conference and, except on so-called distress shipments, particularly on grain,

are generally the same coastwise and foreign from and to all gulf ports. They are invariably the same (page 372) as to petroleum oil (R. 3396). And thereafter (page 378) it is said that (R. 3403), since the ocean rates to and from foreign and coastwise destinations have been and are generally the same from and to all gulf ports, the policy of the Texas & Pacific of maintaining a parity on the through rates and charges via New Orleans on foreign and coastwise traffic with corresponding through rates and charges applicable on such traffic moving via Galveston and the other Texas ports "has resulted in maintaining the same rail rates to and from New Orleans as the competing carriers have maintained to and from the Texas ports."

At page 388 of the same report (R. 3415) it is added that "the competition relied upon by defendants herein is no justification for the resulting prejudice." In similar manner, on pages 352-53 of its 1929 report (R. 3447-48), the Commission again ignores the effect of competitive rates applying on the movement of the traffic in question through the Texas ports, treating the situation merely as if it were dealing alone with the matter of domestic rates applying to and from the respective ports. And immediateley thereafter, on page 355 (R. 3451), the Commission expresses the view that the tendency of the lines serving New Orleans "has been

to give increasing weight to competition and less to the factor of distance."

However, in so refusing to give recognition to the competitive conditions incident to the handling of the traffic in question, and in declining to take into account the water factors applying beyond the ports, the Commission has acted directly counter to the admonitions of this Court in repeated decisions bearing upon the right of carriers to make rates which will enable them to participate with competing carriers in the handling of traffic which may and will move via two or more through routes via which an equality of rates is maintaineed. One of the first of these decisions appears in the so-called *Import Rate Case*, *supra*, decided March 30, 1896, or less than ten years after the creation of the Interstate Commerce Commission in 1887.

The genesis of that proceeding, as in the case at bar, was an order of that Commission by which the Texas & Pacific Railway Company, appellant herein, was denied the right to publish and maintain rates on import traffic from New Orleans, La., to San Francisco, Cal., which were lower than the corresponding domestic rates contemporaneously maintained on shipments of like traffic from New Orleans to that point of final destination. As was pointed out in the Court's opinion (pages 205-7), it was shown by the Texas & Pacific—

"* * * that rates for the transportation of commodities from Liverpool and London, England, to San Francisco, California, are in effect fixed and controlled by the competition of sailing vessels for the entire distance; by steamships and sailing vessels in connection with railroads across the Isthmus of Panama; by steamships and sailing vessels from Europe to New Orleans, connecting these under through arrangements with the Southern Pacific Company to San Francisco: That, unless the defendant company charges substantially the rates specified in its answer, it would be prevented, by reason of the competition aforesaid, from engaging in the carrying and transportation of property and import traffic from Liverpool and London to San Francisco, and would lose the revenue derived by it therefrom, which is considerable, and important and valuable to said company: * * * That the result of the order would be to injuriously affect the defendant company in the carriage of articles of foreign imports to Memphis, St. Louis, Kansas City and other Missouri River points: And that by such order the defendant company would be prevented from competing for freight to important points in the State of Texas with the railroad system of that State, having Galveston as a receiving port, and which railroad system is not subject to the control of the Interstate Commerce Commission."

The Court thereupon in part said (pages 207):

"These and other uncontroverted facts that appear in this record would seem to constitute 'circumstances and conditions' worthy of consideration, when carriers are charged with being guilty of unjust discrimination or of giving unreasonable and

undue preference or advantage to any person or locality.

"But we understand the view of the Commission to have been that it was not competent for the Commission to consider such facts—that it was shut up by the terms of the act of Congress, to consider only such 'circumstances and conditions' as pertained to the articles of traffic after they had reached and been delivered at a port of the United States or Canada."

And further on, at pages 217-18:

"The Commission justified its action wholly upon the construction put by it on the act to regulate commerce, as forbidding the Commission to consider the 'circumstances and conditions' attendant upon the foreign traffic as such 'circumstances and conditions' as they are directed in the act to consider. The Commission thought it was constrained by the act to regard foreign and domestic traffic as like kinds of traffic under substantially similar circumstances and conditions, and that the action of the defendant company in procuring through traffic that would, except for the through rates, not reach the port of New Orleans, and in taking its *pro rata* share of such rates, was an act of 'unjust discrimination,' within the meaning of the act.

"In so construing the act we think the Commission erred.

"As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce,

of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition.

"So far from finding such language, we read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered; but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interest of the public.

Citing the foregoing decision of this Court as an authority, in the course of the first Koch report (R. 3503) the Examiner gave utterance to the following expressions:

> "It is a familiar legal principle that each community is entitled to the benefits arising from its natural advantages, and that neither the commission nor the carriers may lawfully adjust rates for the purpose of equalizing natural advantages. * * In order to meet legitimate competition, therefore, a carrier may reduce its rates so as to have the effect of equalizing to some extent the natural advantages of competitive interests, but there is a limit under the law beyond which the carrier may not go in equalizing those advantages. In determining whether carriers participating in the equalized rates to both ports have not gone beyond that limit with respect to the commodities here considered, the commission must consider all circumstances and conditions of record which reasonable men would regard as affecting the welfare of the ports, the shippers and exporters, the carriers, and the producing and consuming public. *Texas & P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197."

As indicating the lengths to which the Commission was prepared to go in its absolute determination arbitrarily so to exercise its authority as to force upon the carriers a rate adjustment intended to have, and which would in fact have, the effect of diverting the movement of the foreign and coastwise traffic under consideration away from the port of New Orleans and from the rails

of the New Orleans carriers, by referring to the Commission's 1927 report (R. 3404-5) it will be found that, except for eighteen out of the first nineteen words in the above quotation, we look in vain therefor in the Commission's said report. And not only that, but in lieu thereof the Commission substituted the following comment, which includes a citation to one of its own prior reports, in which there appears a statement of the law directtly contrary to that laid down by this Court in the case cited by the Examiner:

> "The Texas & Pacific insists that since this traffic neither originates at nor is destined to any of the ports, the rail rates which we are here considering are in essence proportional rates, constituting merely factors of the aggregate through rates between the interior points and the foreign or coastwise destinations beyond, and that in determining the matter of port equalization consideration should be given, not only to the rail factors, but also to the water factors which enter into these aggregates. In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, division 2 found a similar contention to be without merit. Equalization of port rates on the basis advocated by this carrier would require consideration, in every instance of port relationship, of water rates not on file with us and over which, except on coastwise traffic under certain circumstances, we have no jurisdiction."

We have previously had occasion to direct attention to the observations of this Court with respect to the action of the Commission in "letting out" the Illinois

Central upon the disclosure that its order had resulted in depriving that line of a valuable part of its traffic. Just what the right so accorded to the Illinois Central of equalizing its rates applying on shipments of foreign traffic moving between New Orleans and interior points on its line with the corresponding rates applying on the movement of such traffic between New York and other Atlantic ports and such interior points has meant to that carrier, as well as to the shippers and communities served by it, is most graphically portrayed (R. 467-79, 1543-75) in the testimony of witness W. M. Rhett, its Foreign Freight Agent. Time and space will not permit us to dwell herein upon the evidence given by Mr. Rhett, but before proceeding with our argumnt we feel constrained to ask, since it was then conceded to be in the public interest and to the interest of the Illinois Central to permit that line to maintain New Orleans on a rate parity as to foreign traffic with the Atlantic seaboard in the territory served by it, why should not the Texas & Pacific, appellant herein, be likewise permitted to maintain New Orleans on a similar rate parity in competitive territory as to foreign and coastwise traffic with Galveston and the other Texas gulf ports?

Commenting upon the testimony of this witness, the Commission, at page 368 of its 1927 report (R. 3390), in part says:

"Differentials of New Orleans and other gulf ports and south Atlantic ports under New York and other north Atlantic ports are now in effect on all European and African import trafic destined to points on and north of the Ohio River. The foreign freight agent of the Illinois Central testified that such diferentials were essential in order to enable gulf ports to compete on a fair basis with north Atlantic ports for the reason that the steamship service at north Atlantic ports is superior to that at New Orleans. Prior to the general increases of 1920 those differentials ranged from 18 cents on first-class traffic to 6 cents on sixth-class and low-rated commodities. Since then those differentials have been somewhat increased by the general rate changes. * * *"

Through some seeming oversight on its part, however, although strictly in conformity with its practice of ignoring the rate adjustment beyond the ports, the Commission overlooked the further testimony of witness Rhett and other witnesses (R. 469-70, 472, 474, 1323, 1421, 1428, 1429), whereby it was brought out that the ocean rates from trans-Atlantic points to the gulf ports are on a higher basis than those applying from the same points to the north Atlantic ports, to say nothing of higher interest and insurance costs via the gulf routes. Obviously, if the rail rates from the gulf ports to the interior were maintained on the same level as those applying from the north Atlantic ports to the same interior points, the through import rates prevailing

through the latter ports would be lower than the through import rates applying through the gulf ports to the extent of the difference in the respective ocean factors.

But, aside from that, if the Illinois Central is permitted to maintain its rates on foreign and coastwise traffic on a lower basis than the rates observed on such traffic by lines serving the Atlantic ports, even though it has fourth-section relief to enable it to do so (R. 470; also, 169 Inters. Com. Rep. 13, *supra*), why should the Commission deny this appellant an opportunity to compete with lines serving the Texas gulf ports for the handling of foreign and coastwise traffic, especially when it proposes to go no further than to maintain its rates on a parity with the rail rates contemporaneously obtaining from one or the other of the latter ports? As a matter of fact, the foreign and coastwise rate adjustment maintained by the Illinois Central is purely voluntary on its part, and appellant is merely seeking a like freedom of opportunity in the making of its rates and in the shaping of its rate policies.

Since the decision was handed down in the foregoing *Import Rate Case*, the Court has repeatedly reaffirmed the holding therein, usually in cases relating to the requirements of the fourth section, that the Commission, in determining whether rates made by the carriers under the stress of competitive influences give rise to undue

preference or prejudice, must take into consideration *all* potent circumstances and conditions bearing upon the situation. Thus, in *Int. Com. Com.* v. *Alabama Midland R'y., supra,* citing *Interstate Com. Commission* v. *Baltimore & Ohio R. R.,* 145 U. S. 263, as well as the aforesaid *Import Rate Case,* at pages 164-65 it was said:

> "In construing statutory provisions, forbidding railway companies from giving any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatever, the English courts have held, after full consideration, that competition between rival lines is a fact to be considered, and that a preference or advantage thence arising is not necessarily undue or unreasonable. *Denaby Main Colliery Co.* v. *Manchester, Sheffield & Lincolnshire Railway,* 11 App. Cas. 97; *Phipps* v. *London & North Western Railway,* 2 Q. B. D. 1892, 229.
>
> "But the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court."

Again, in *Louisville & N. Railroad Co.* v. *Behlmer,* 175 U. S. 648, 670-71, the Court expressed the following highly pertinent thoughts:

> " * * * What was decided in the previous cases was that under the fourth section of the act substantial competition which materially affected

> transportation and rates might under the statute be competent to produce dissimilarity of circumstances and conditions, to be taken into consideration by the carrier in charging a greater sum for a lesser than for a longer haul. The meaning of the law was not decided to be that one kind of competition could be considered and not another kind, but that all competition, provided it possessed the attributes of producing a substantial and material effect upon traffic and rate-making, was proper under the statute to be taken into consideration."

This case was cited and followed in *East Tenn. &c. Ry Co.* v. *Interstate Com.*, 181 U. S. 1, at pages 18-19.

When it is recalled that we are here dealing with an *equality of rates* rather than with *unequal rates*, the force of the foregoing observations of this Court take on added significance. And of similar import are the more recent opinions in *Southern Pacific* v. *Interstate Com. Com.*, 200 U. S. 536, 552, in the so-called *Intermountain Rate Cases*, 234 U. S. 476, 482, and in *Skinner & Eddy Corp.* v. *United States*, *supra*. In the latter case the Court was concerned with the right of a carrier to increase a rate which had once been reduced in competition with a water route or routes. As to this, the Court in part said (pages 567-68):

> "The language of the paragraph is general, and, read alone, might compel that construction. But it may not be read alone. * * *

"The construction contended for by plaintiff would rather ensure monoply than preserve competition. * * * Only compelling language could cause us to impute to Congress the intention to produce results so absurd; and the language of the last paragraph of § 4 is clearly susceptible of the more reasonable construction contended for by defendants."

See also *Int. Com. Com.* v. *Balt. & Ohio R. R.*, 225 U. S. 326, 346, where the Court said: "* * * We see many differences between such a shipper receiving coal for use in its locomotives and a nation as the destination of goods from other nations for distribution throughout its expanse on through rates from points of origin."

Paragraph (1) of § 3 of the Interstate Commerce Act has not been amended, but stands in the form in which it was first enacted in the original Act to Regulate Commerce of February 4, 1887. It has been remarked by this Court in earlier decisions that this section of the Act was based upon the second section of the English Act to regulate railways of July 10, 1854, and the eleventh section of the Act amendatory thereof of July 21, 1873. It will be noted further that § 3 of the Act has added the word "locality", which did not appear in the English Act. The relation between § 3 of the Act to Regulate Commerce and the English Acts for the same purpose are set forth in detail in case *Texas &*

Pacific Railway v. *Interstate Com. Com.*, 162 U. S. 197, cited above. See also *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad Co.*, 145 U. S. 263, *supra.*

In this case the Commission utterly ignored the element of competition in fixing the rate. The competition in this case, in so far as the Texas & Pacific and the Louisiana & Arkansas are concerned, is active and actual, not potential or theoretical. In cases arising under the third section of the Interstate Commerce Act, both the Commission and this Court, as well as other federal courts, have held that actual competition must be taken into consideration in arriving at the rate. See *Texas & Pacific Railway* v. *Interstate Com. Com.*, *supra; East Tenn. Ry. Co.* v. *Interstate Com. Com.*, *supra*, and cases cited; *Int. Com. Com.* v. *Alabama Midland Railway, supra;* Judson on Interstate Commerce, §§ 175-183; *Interstate Commerce Commission* v. *Clyde S. S. Co.*, 93 Fed. 83; *Interstate Commerce Commission* v. *Chicago Great Western Railway Company*, 141 Fed. 1003, 1014, 1016, 1018. In *Texas & Pacific Railway* v. *Interstate Com. Com.*, 162 U. S. 233-34, the Court declared:

> "That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, competition that affects rates should be considered, and

in deciidng whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not undue and unjust, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered."

"And in *East Tenn. &c. Ry. Co.* v. *Interstate Com.*, 181 U. S., 18-19, the Court further said:

"The prohibition of the third section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the *Behlmer case*, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it can not be that the availing of this right is the cause of the preference, and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination.

"The only principle by which it is possible to enforce the whole statute is the construction adopted by the previous opinions of this court; that is, that competition which is real and substantial, and exer-

> cises a potential influence on rates to a particular point, brings into play the dissimilarity of circumstance and condition provided by the statute, and justifies the lesser charge to the more distant and competitive point than to the nearer and non-competitive place, and that this right is not destroyed by the mere fact that incidentally the lesser charge to the competitive point may seemingly give a preference to that point, and the greater rate to the non-competitive point may apparently engender a discrimination against it. We say seemingly on the one hand and apparently on the other, because in the supposed cases the preference is not 'undue' or the discrimination 'unjust.' This is clearly so, when it is considered that the lesser charge upon which both the assumption of preference and discrimination is predicated is sanctioned by the statute, which causes the competition to give rise to the right to make such lesser charge."

In *Interstate Commerce Commission* v. *Chicago Great Western Railway Co.*, 209 U. S. 108, 119, the Court said:

> " * * * in fixing their own rates they [carriers] may take into account competition with other carriers, provided only that the competition is genuine and not a pretense."

The fact that a lower or a equal rate is given to a more distant point than to a less distant point does not violate the third section, if the rate was brought about by competition. In such a case the preference on the one hand is held not to be "undue" and the discrimination

on the other hand is declared not to be "unjust" or "unreasonable." The competition, however, upon which lower charges to more distant points is based must be real, and not simply potential or conjectural, or a mere pretense. 209 U. S. 108. Such rates must depend upon the actual existence of competition, and not upon the mere possibility of competition arising. Also, the competition must be controlling, and it must not have been created by the carriers through combination or agreement. *Interstate Commerce Commission v. Louisville &c. Railroad Co.*, 190 U. S. 273.

In *Texas & Pacific Railway* v. *Interstate Com. Com.*, 162 U. S. 197, 219-20, the Court interpreted the meaning of § 3 thus:

> "The third section forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, corporation or locality; and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which car-

> riers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable.

In *Louisville & Nashville Railroad Company* v. *Behlmer*, 175 U. S. 648, 663, and other cases cited, the Court held that competition which is controlling on traffic and rates produces in and of itself the dissimilarity of circumstance and condition described in the statute, and that where this condition exists a carrier has a right of its own volition to take it into view in fixing rates to the competitive point, based on these conditions.

The Interstate Commerce Commission, in *Maritime Asso., Boston Chamber of Commerce*, v. *A. A. R. R. Co.*, 95 Inters. Com. Rep., 539, 565-66, says:

> "In passing upon the reasonableness of rates or in determining whether or not undue prejudice and preference exist, it is well settled that cost of service is a factor which must be taken into consideration. There are other factors which have weight, but cost of service is one of the most important. Certainly we are not warranted, in our determination of these matters, in disregarding differences in distances which are substantial and material when compared with the total hauls involved. It is true that there are many instances in the rate structure where distance seems to have been given little or no consideration and that rates are often blanketed over great

areas. But these situations are either the product of common consent, so that they are not subjected to the tests of the law, or they result from competitive influences."

The Commission further says, on pages 566-67:

"Summing up this phase of the matter, the railroads are monopolistic in many respects, and because of that fact are subject to public regulation. In this public regulation cost of service and hence distance are factors which must be taken into consideration. But the railroads are also subject to competition with respect to much of their traffic, and it has been and is the policy of public regulation to allow them considerable latitude in meeting this competition. This accounts for many of the apparent inconsistencies in the rate structure and also for many of the instances where distances are disregarded."

It is clearly established by the record herein that The Texas and Pacific Railway Company earns a substantial revenue on import, export, and coastwise traffic moved upon a parity of rates between the ports of Texas and the ports of Louisiana, and that this movement is not made at the expense of other traffic. It is further unquestioned in this record that actually present controlling competition exists between rail lines serving the ports of Texas and the Texas & Pacific and the Louisiana & Arkansas serving the port of New Orleans. It is uncontradicted that, with the differentials provided

for in the orders of the Commission herein, import, export, and coastwise traffic originating or ending at points on the Texas & Pacific in the defined territory will be diverted from the Texas & Pacific and from the port of New Orleans to the Texas ports, and that the Texas & Pacific will not enjoy this traffic at all, as the difference in rate makes its movement through the Louisiana ports prohibitory. The Commission in its orders herein utterly ignores the element of competition. The facts in the record contradict any conclusion it might reach that the service now performed upon a parity of rates is at the expense of other traffic.

The finding of the Commission is arbitrary and without any evidence to support same. The orders of the Commission are in violation of the Constitution of the United States and in violation of all rules of equity and justice. One of the most important maxims in equity is that equality is equity. In this case the Texas & Pacific does not ask for a lower rate to the ports of Louisiana than to the ports of Texas, but merely asks that it be permitted to continue in effect a rate situation that has been in effect since the organization of the Texas & Pacific, and since Houston and Galveston became ports, of an equality of rates as between the port of New Orleans and the Texas ports. How this condition of equality could create undue preference or undue prejudice is impossible to imagine. The Com-

mission in so holding, in view of the facts in this case, shocks the conscience of a chancelor and violates every sense of justice and fairness.

SEVENTH PROPOSITION

The orders of the Commission under review herein are repugnant to and in violation of the constitutional limitation upon the power of the Congress to give a preference by regulation of commerce or revenue to the ports of one state over those of another.

(Germane to Assignments Nos. 25, 26 and 28.)

Armour Packing Co. v. *United States*, 209 U. S. 56, 70;

Pennsylvania v. *Wheling & B. Bridge Co.*, 18 How. 421, 433;

Gibbons v. Ogden, 9 Wheat 1.

Among the powers denied to the Congress by the limitations incorporated in § 9 of Article 1 of the Constitution of the United States, there was included in paragraph 5 thereof the following provision:

> "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of One State over those of another.

The Commission alludes to this constitutional limitation on page 378 of its 1927 report (R. 3403), but

brushes it aside by quoting the following sentence from *Armour Packing Co.* v. *United States*, 209 U. S. 56, 80:

> "The fact that regulation, within the acknowledged power of Congress to enact, may affect the ports of one State more than those of another, can not be construed as a violation of this constitutional provision."

In the same paragraph from which the foregoing quotation was extracted, however, there appears the following significant further observation by the Court, to wit:

> "This provision was intended to prevent legislation intended to give and having the effect of giving preference to the ports of one State over those of another State."

Inasmuch as it is anticipated that this topic will be dealt with in greater detail in the briefs of the intervening Louisiana interests, we shall accordingly forego herein a more extended treatment of the subject.

EIGHTH PROPOSITION

The voluntary maintenance by the carriers of New Orleans, as to quasi-proportional rail rates on foreign and coastwise traffic which moves through the ports, on a parity with Galveston or with any other Texas gulf port (even though such rates be lower than the rates contemporaneously maintained by them on domestic shipments of such traffic between New Orleans and the same interior points) does not and cannot, as a matter of law, give rise to undue preference of the former or undue prejudice to the latter. Likewise, the Commission's ultimate finding herein of the existence of undue preference of New Orleans and undue prejudice to Galveston not only is unsupported by but is contrary to the evidence of record and the Commission's findings of fact based thereon.

(Germane to Assignments Nos. 2, 3, 4, 6, 15, 16, 18, 22, 24 and 28.)

Texas & P. Ry. Co. v. *Interstate Commerce Commission, supra;*

Chicago, I. & L. R. Co. v. *United States,* 270 U. S. 287, 293;

Louisville & N. R. Co. v. *Behlmer,* 175 U. S. 648;

and other authorities cited above under the Fourth Proposition.

NINTH PROPOSITION

The Commission having laid down and adopted as the basis for its order in cause No. 12798 a more restricted rule as to circuity than was and is applied by it on the same commodities under the fourth section, where the same limitation as to undue preference exists as in this case, such orders are arbitrary and hence null and void.

(Germane to Assignment No. 13j.)

Atchison, T. & S. F. R. Co. v. *United States*, 191 Fed. 856;

United States v. *Atchison, T. & S. F. Ry. Co.* (the *Intermountain Rate cases)* 234 U. S. 476, 485, *supra;*

Memphis-Southwestern Investigation, 55 Inters. Com. Rep. 515, 523;

Consolidated Southwestern Cases, 123 Inters. Com. Rep. 203, 216-17;

Oklahoma Corporation Commission v. *Abilene & S. R. Co.*, 98 Inters. Com. Rep. 183 (Fourth Section Order No. 9133);

Oklahoma Corporation Commission v. *Abilene & S. R. Co.*, 101 Inters. Com. Rep. 116 (Fourth Section Order No. 9156).

TENTH PROPOSITION

In many respects the Commission's evidentiary findings of fact are either unsupported by any evidence or else are contrary to the uncontradicted evidence of record, and hence its action in making such findings is arbitrary and capricious and its orders based thereon are null and void.

Inasmuch as the facts relied upon in support of the second and third of the foregoing two propositions are likewise relevant to the first, we shall deal with the three collectively in the following discussion.

Under a preceding proposition, it was pointed out that the legal effect of the evidence is a question of law, and that no finding by the Commission of the existence of undue prejudice can prevent a review of such question by this Court. To the foregoing expressions, we now add the observation of this Court in *Chicago, I. & L. R. Co.* v. *United States*, *supra*, at page 293, that "unjust discrimination may exist in law as well as in fact."

Conversely, we submit that the sufficiency of the evidence to support a finding of unjust discrimination or undue prejudice is, by parity of reasoning, likewise a question of law. Such, indeed, appears to have been the holding of this Court in the so-called *Import Rate case*, *supra*. Thus, after referring on page 207 to the

Commission's indicated view that by the terms of the statute it was privileged to consider only such "circumstances and conditions" as pertained to the import traffic therein under consideration after same had reached and been delivered at a port of the United States or Canada, and that it was precluded from taking into account (page 205) any circumstances and conditions which exist beyond the seaboard of the United States for the purpose of justifying a difference in rates between import and domestic traffic, the Court at page 210 expressed the following conclusion:

> "We have, therefore, to deal only with a question of law, and that is, what is the true construction, in respect to the matters involved in the present controversy, of the act to regulate commerce? If the construction put upon the act by the Commission was right, then the order was lawful; otherwise it was not."

Our Fourth Proposition, *supra*, was devoted to the legal principle that, since the carriers appellant herein have no controlling voice over the rail rates to and from any of the Texas ports, they can not be charged with creating undue preference of New Orleans or undue prejudice to such Texas ports by maintaining their proportional rail rates to and from New Orleans on foreign and coastwise traffic on a parity with the corresponding Texas port rates. We now come, however, to the broader proposition that, due consideration being given

to the fact that the particular traffic with which we are here dealing has either origin or destination in foreign lands "beyond the seaboard of the United States," or perhaps at other points "on our own distant coasts," and to the "circumstances and conditions" appertaining to that part of the transportation that is not within the jurisdiction of the Commission, no undue prejudice to Galveston or the other Texas ports can or does arise from the maintenance via competitive routes through the port of New Orleans of *through* rates that are normally the same as those applying via other routes operated through any of the Texas ports.

As to this, we confidently assert that, so long as the proportional rail rates maintained on this traffic to and from the port of New Orleans are sufficiently remunerative to more than meet the cost of handling the traffic by the carriers participating therein, in short, so as not to throw a burden upon other traffic, the maintenance of such proportional rail rates is not interdicted by the requirements of § 3 of the Interstate Commerce Act, and the interested carriers have the lawful right to publish such equalized rates in meeting the rates applying via competitive routes through other ports. This is true, we further insist, regardless of whether the carriers participating therein serve with their own rails any or all of the competitive ports.

To illustrate, there are certain lines, such as the Frisco (St. Louis-San Francisco Railway), the Rock Island (Chicago, Rock Island & Pacific Railway), and the Cotton Belt (St. Louis Southwestern Railway), which do not reach via their own rails or those of their Texas subsidiaries either the port of New Orleans, or any of the Texas gulf ports, and which control the rates to none of such ports. Then there are other carriers, such as the Southern Pacific Lines (the Texas & New Orleans Railroad) and the so-called Gulf Coast Lines, which serve with their own rails both the port of New Orleans and one or more of the Texas ports, and which may be said to be in a position to control the rates to any and all of the ports reached by them. It is our proposition that each and all of such carriers are free to publish and participate in the *same* rates to each of these ports on the foreign and coastwise traffic with which we are here concerned, and that in doing so they may not be charged with creating undue preference of or undue prejudice to any of such ports.

This, of course, is subject to the qualification that none of such rates may be in violation of § 1 by being unreasonably high, nor may they be in any instance so low as not to pay the cost of the service in handling the traffic. None of the rates in controversy has been shown to be unreasonably high; indeed, the issue of unreasonableness was specifically withdrawn by the

complainant at the hearing, besides which, as stated by the Commission (R. 3452), with but few exceptions the rates in issue are on bases the same as or lower than prescribed or approved by it. On the contrary, in its 1925 report (R. 3353) the Commission referred to an absence of evidence tending to show that any of the New Orleans rates are so low as to throw a burden upon other traffic, and the uncontroverted evidence of this appellant subsequently introduced, as will later be shown, abundantly demonstrates that, because of a peculiar operating condition existing on its Louisiana lines, it can handle the bulk of such traffic at a net profit perhaps fully as great as that accruing to the competitive lines serving the Texas ports.

In a prior section of this brief, we have alluded in a general way to the holding of this Court in the so-called *Import Rate Case*, *supra*, that the mere existence of a preference or advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the act, and also, as in *United States* v. *Illinois Cent. R. Co.*, *supra*, that the existence *vel non* of unjust discrimination is to be measured solely by the transportation standard. In the latter case this Court additionally declared, at page 521, that only such rates as involve unjust discrimination are obnoxious to § 3. Hence, even though a given rate adjust-

ment is found to give rise to preference and prejudice, if it is brought about by and is attributable to the stress of competition, or to some like circumstance and condition, such resulting preference and prejudice is not *undue*, and therefore is not within the condemnation of the statute. And this is so even as to traffic that does not have a common origin and destination.

Thus, in *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648, *supra*, it was held that the maintenance of lower rates on hay from Memphis, Tenn., to Charleston, S. C., than to intermediate points via the route of movement was not unlawful, inasmuch as the lower rate to Charleston applied via at least eight competing routes from Memphis, and it was additionally pointed out at page 651 that the lower rate to Charleston was brought about by the competition of shipments of hay originating in Chicago, New York, and eastern points, and moving via rail-and-water routes to Charleston. It is true that that case turned upon a interpretation of the fourth section, but it must be borne in mind that the fourth section merely condemns certain specified forms of discrimination which would come under the prohibitory requirements of the third section, even in the absence of the specified legislative inhibitions embodied in the fourth section. If the maintenance of a *higher* rate to an intermediate point than the rate applying to a more distant point was justified under the fourth section prior to the

1910 amendment, surely the maintenance of an *equality* of rates via competitive routes is not in violation of the provisions of the third section.

Said former Commissioner Hall as to this in his dissenting opinion (R. 3431):

> " * * * I fail to perceive how a carrier which serves one of these ports, but not the other, violates the law by maintaining to its port reasonable rates equal to the reasonable rates maintained by another carrier to the other port, or that any carrier, whether serving both ports or not, violates the law by meeting that carrier's competition and maintaining like reasonable rates to both ports. In the absence of a clear showing of substantial injury carriers should be left free to adjust their rates on a competitive basis so long as neither set of rates transgresses the limits of maximum or minimum reasonableness."

Aside, however, from the contention that it is impossible for the Texas ports to suffer a legal injury in consequence of the maintenance of an equality of through rates via competitive routes through the port of New Orleans, appellants further maintain that the Commission's basic findings of fact, as set forth in its respective reports, do not support its further conclusion or ultimate finding that undue preference of New Orleans or undue prejudice to Galveston and the other near-by Texas gulf ports has arisen from the evidentiary facts so gleaned by the Commission from the evidence of

record. While we shall show that in several particulars the Commission has either ignored and rejected certain uncontroverted evidence, or else has made certain findings of fact less favorable to appellants than warranted by the evidence, this for the purpose of demonstrating its determination to impose upon the appellants herein an arbitrary rate adjustment, nevertheless it is our position herein that, taken at their face value, the Commission's findings of fact do not disclose the existence of undue preference of New Orleans or undue prejudice to Galveston or any of the other Texas ports.

This leads us to a general review of the evidence of record, particularly as same has been summarized in the several reports of the Commission in these proceedings. We shall first discuss the origin and development of the principal gulf ports to which this controversy relates.

Beginning with the port of New Orleans, we quote as follows from the Commission's 1927 report (R. 3384-85):

> "New Orleans is located on the Mississippi River about 110 miles from the Gulf, with which it is connected by passes in the river of ample depth. In 1901 the Board of Commissioners of the Port of New Orleans, referred to as the Dock Board, formally took charge of the administration of the port and harbor. Since then the port and harbor facilities have been under unified control and have been operated under the policy of equal privileges to all."

The foregoing, however, is only a partial picture, and for more complete details we turn to the testimony of an official of the Dock Board (R. 1331-36), from which we learn that the port of New Orleans dates from 1718, that in 1795 it became a free port by virtue of a treaty entered into between Spain and the United States declaring the banks of the Mississippi River open to use by American citizens, and that this servitude in favor of the public was permanently fixed by the Louisiana Purchase Treaty of 1803. The Board of Commissioners of the Port of New Orleans was created by legislative act in 1896.

With reference to the Texas ports, the Commission in its 1927 report (R. 3485-86) summarized the evidence as follows:

> "Galveston and the other Texas ports were established long after New Orleans was recognized as a port. The first substantial federal appropriation toward the establishment of Galveston as a port was made in 1890, shortly after a board of engineers of the United States Army had selected Galveston as the most desirable location for a port west of New Orleans which would be readily accessible to the extensive territory then rapidly developing in Texas, Oklahoma, Kansas, and other states west of the Mississippi River. Contrary to the situation at New Orleans, the port facilities at Galveston and the other Texas ports, with some exceptions at Houston, are privately owned and operated."

The Commission's report is strangely silent upon the development of Houston as a deepwater port. This

feature, however, we believe is of peculiar significance, and warrants our going to the record for information relating thereto. Houston, which is located 50 miles inland (R. 1931, 2031), to quote from Exhibit A-142, a document prepared by the Board of Engineers for Rivers and Harbors of the War Department in co-operation with the Bureau of Research of the United States Shipping Board, and known as Port Series No. 6 (R. 1222, 1236), "furnishes a noteworthy example of a successful port at an inland point originally inaccessible to ocean vessels." This was accomplished (*id.*) by the construction of a channel across Galveston Bay and thence to within seven miles of the business section of Houston under congressional acts of March 3, 1899, and March 2, 1919. The port was opened in December, 1914 (R. 2031), and the first exportation from Houston (*id.*) occurred late in 1915. Incidentally, it may be mentioned here that deep water was established at Beaumont in 1916 (R. 1243, 2062). The foregoing information is in part taken from authentic governmental documents and in part from the testimony of witnesses for the Texas ports, and is uncontroverted.

At page 111 of its 1922 report (R. 3348), the Commission states that Houston is 48 miles north of Galveston, and that Texas City is 10 miles, Beaumont 76 miles, Port Arthur 96 miles, and Orange 98 miles east of Galveston. These ports are located in a compact group in the south-

east corner of Texas, and obviously serve as outlets for the same general interior territory.

We next take up the relative development of New Orleans and the Texas ports. This is discussed on pages 358-63 of the Commission's 1927 report (R. 3378-84), and also appears from Tables 1 to 6 accompanying said report as an appendix (R. 3433-36). Stating that "The net tonnage of ships entered and cleared and the tonnage of commodities handled by the respective ports affords a general index to the relative growth of these ports," the Commission summarizes Tables 1 and 2 of said appendix by stating that they indicate that, "measured by the net tonnage and the number of vessels entered and cleared, the Galveston district [*i. e.*, Galveston, Houston, and Texas City] has progressed somewhat faster than the New Orleans district, while the Sabine district [including Beaumont, Orange, and Port Arthur] has steadily declined."

The Commission thereupon continued thus (R. 3380-81):

> "The net tonnage of import traffic has increased more rapidly during and since 1919 through the Texas ports combined than through New Orleans. In that year the total import movement in net tons was 2,911,798 through New Orleans, and 2,121,528 through the Texas ports. In 1924 this had increased to 4,654,467 and 4,435,127, respectively, or an increase of 60 per cent through New Orleans and

of 109 per cent through the Texas ports. During the same period the coastwise receipts and shipments combined increased 22 per cent through New Orleans and 43 per cent through the Texas ports, the total number of tons handled in 1924 being 2,520,435 by New Orleans and 18,380,589 by the Texas ports. The export traffic during the same period showed no increase for New Orleans and only about 2 per cent increase for the Texas ports, the figures being for New Orleans 4,232,916 in 1919 and 4,225,960 in 1924, and for the Texas ports 6,935,070 in 1919 and 7,082,229 in 1924. The total of foreign and coastwise traffic was 9,202,773 tons in 1919 and 11,400,862 tons in 1924 for New Orleans, an increase of 24 per cent, and 21,901,331 in 1919 and 29,917,954 in 1924 for the Texas ports, an increase of 36 per cent.

"In round figures, the total imports during the five-year period 1920 to 1924, inclusive, through the Texas ports amounted to 24,000,000 tons, of which about 23,000,000 were non-metallic minerals, and through New Orleans 22,000,000 tons, of which 11,000,000 were non-metallic minerals and 8,000,000 were principally bananas, coffee, molasses, and sugar. During the same period the export movement through the Texas ports totaled about 31,000,000 tons and through New Orleans 23,000,000 tons, divided approximately as follows: Vegetable food products, oil seeds, and cereals, principally grain and grain products, 8,331,226 tons through the Texas ports and 8,200,209 tons through New Orleans; textiles, principally cotton, 4,398,151 and 1,505,609 tons, respectively; wood and paper, principally lumber, 1,282,031 and 3,624,712 tons, respectively; and non-metallic minerals, principally petroleum

and its products, 17,125,576 and 7,451,945 tons, respectively.

"New Orleans interests regard the foregoing figures as proof that the Texas ports have handled their fair share of the foreign and coastwise traffic through the Gulf. The figures given for New Orleans, however, do not include the other Louisiana ports, through which the principal movement is petroleum and petroleum products. The total of all exports and imports in 1924 through all of the Louisiana ports is shown as 9,546,964 gross tons and through all of the Texas ports 9,982,282 gross tons. Of these amounts New Orleans handled in imports 4,476,957 and in exports 3,687,477, a total of 8,164,434, and Galveston handled in imports 1,569,412, in exports, 1,652,090, a total of 3,221,502."

It will be remembered that, prior to December 12, 1927, when the Commission's 1927 order became effective, the rates to and from the port of New Orleans on foreign and coastwise traffic were freely equalized by the rail carriers with those applying to and from the Texas ports, and during the period covered by the foregoing statistical summary there was in effect no arbitrary rate adjustment prescribed by the Commission to force the movement of such traffic through the Texas ports rather than through New Orleans. Under these circumstances, it will be seen that the newer Texas ports, as a group, were even more prosperous and were doing a greater business in the absence of a compulsory "differential" rate adjustment on this foreign and coastwise

traffic than was the port of New Orleans, with all its vaunted putative advantages.

Evidently realizing that the foregoing statistical data are altogether insufficient to indicate that New Orleans was deriving any undue advantage from the equalized rate adjustment under review, the Commission on pages 360-61 of its 1927 report (R. 3381-82) proceeded to segregate as between Galveston and certain of the other Texas ports the total movement of the traffic through the combined ports, and with particular reference to Table 3 of the appendix thereto arrived at the following conclusion:

> "The figures in this table show, using 1912 as a base, that while Galveston made much greater progress than the other Gulf ports in import traffic and than all other Texas ports, except Houston, in export and coastwise traffic, its progress was less rapid than that of New Orleans and considerably slower than that of Houston in export and coastwise traffic. Of the total traffic handled the percentage of Galveston since 1912 has been much behind that of New Orleans or Houston, as well as all of the other Texas ports combined. In 1924 its total tonnage was 1,309,634 less than in 1920, while that of New Orleans was 886,999 more, and that of all the Texas ports combined 7,231,150 more. In that period Houston increased its tonnage from 714,621 to 5,343,598, or an increase of 4,628,977. The increase in Houston tonnage has been mostly in export and coastwise traffic."

The foregoing illustrates most effectively the significance of the evidence omitted from the Commission's report as to the recent development of the competitive deepwater ports in the vicinity of Galveston. Although at the time New Orleans was established as a port Galveston was "a windswept wilderness" (R. 1737), during the twenty-five or thirty years between the time it became a deepwater port and the 1926 hearing (*id.*) it developed into "one of the greatest ports of the world." But with the creation of Houston and Beaumont as deepwater ports in 1915 and 1916, principally the former, a radically different condition arose.

Aside from the diversion of traffic from Galveston that naturally would follow the establishment of a nearby competitive port, even on an equality of rail rates, it is obvious that, under any adjustment of the rail rates based on distance, being located some 50 miles farther inland than Galveston, Houston will have the advantage of lower rates than Galveston as to a large area in the hinterland; and this would be true also as to distance rates based on mileage blocks of 50 miles or less. Thus, we have already had occasion to make reference to the fact that, under the distance scale of rates on cottonseed cake and meal made effective December 12, 1927 (P. 3021), the rate on that commodity from Dallas and Mineola to Galveston became 27 cents as compared with a rate of 25 cents from Dallas and Mineola to Houston.

In the case of Fort Worth (*id.*) rates of 26 and 29 cents were published to Houston and Galveston, respectively, and similar rate differences resulted as to numerous other interior points.

The inevitable result of this rate "set up" has been to demonstrate the truth of the well-recognized principle that commerce follows the line of least resistance. As pointed out by the Commission in the foregoing quotation, during the period from 1920 to 1924 Houston increased its tonnage from 714,621 to 5,343,598, while at the same time Galveston tonnage decreased to the extent of 1,309,634, notwithstanding an increase in the tonnage of all the Texas ports combined of 7,231,050.* The following figures abstracted from Table 3 in the appendix to the Commission's 1927 report (R. 3434) illustrate the steady and prolific growth of Houston as a port during the years 1919 to 1924, inclusive:

Total Net Tonnage Handled by Houston, Texas.

Year	*Net Tons.*
1919	446,685
1920	714,621
1921	1,387,523
1922	2,027,936
1923	3,168,991
1924	5,343,598

*Even now, the Galveston interests are seeking to obtain from the rate regulatory authorities, and with at least no small degree of success, a compulsory equalization with Houston of the rates on this foreign and coastwise traffic. See, for example, **Houston Chamber of Commerce** v. **Railroad Commission Texas,** 19 S. W. (2d) 583, at page

Had it not been that Houston was painted into the picture as a deepwater port about 1915, it may be taken for granted that at least the greater part of the more than 5,000,000 net tons handled through that port in 1924 would have passed through Galveston, so that, instead of showing a decrease in 1924 under 1920, the latter would have shown a healthy increase for the same period. Certainly, though, with the Texas ports combined showing an increase of more than 7,000,000 net tons handled in 1924 over 1919, there is absolutely no indication that any undue prejudice to such ports resulted from the policy of equalization as to rates on foreign and coastwise traffic maintained by the New Orleans carriers and certain of their connections during that period and long prior thereto.

We deem it appropriate here to direct attention to the following trenchant paragraphs abstracted (R. 3430-32) from the dissenting opinion of former Commissioner Hall to the Commission's 1927 report:

> "The Texas ports, considered as a whole, show a gain of 334 per cent in total tonnage, 1924 over 1912. Houston alone, shows a gain of 391 per cent for that period, whereas New Orleans has gained 225 per cent. Although Galveston's gain was only 191 per cent it is manifest that its failure to keep

585, relating to intrastate rates on sugar and molasses; **Rate Structure Investigation, Part 3, Cotton**; 165 Inters. Com. Rep. 595, at page 667, relating to rates on cotton; **Grain and Grain Products**, 164 Inters. Com. Rep. 619, at pages 687-88. Cf. **Port Arthur Chamber of Commerce & Shipping v. Aberdeen & R. R. Co.**, 169 Inters. Com. Rep. 753, in which the Commission prescribed a limited equalization of the rates to Port Arthur with the corresponding rates to one or more of the Texas gulf ports.

pace with New Orleans in percentage of gain
due to the rapid growth of traffic through
Texas ports, and not to inroads by New Orlea

* * * * *

"In the case before us there is no persua
showing that the Texas ports have had a less hea
development of traffic than New Orleans, fo
ample. Considered as a whole they have gained
more than New Orleans both in percentage a
total tonnage. Galveston has gained less than H
ton, but both make common cause against
Louisiana rival. In finding undue prejudice t
Texas ports we are unwittingly reversing the r
dial purpose of the statute. The ports, like
railroads, are there to serve the shipper, no
shipper to serve the ports or the railroads.
Sabbath was made for man, and not man fo
Sabbath.'"

Evidently sensing the need, in the face of the
facts disclosed by the foregoing statistics, of somet
additional on which to base its ultimate finding of u
preference and prejudice occasioned by the equaliz
of New Orleans with Galveston as to the rail rate fa
applied to and from the ports on foreign and coast
traffic, the Commission seized upon the purely s
lative and conjectural opinion testimony given by a
fic official (R. 616, 2274) of the Gulf, Colorado
Santa Fe Railway Company, nominally a defenda
the complaint before the Commission but actually o
the most active sponsors of such complaint, to su

the ensuing statements appearing in its 1925 and 1927 reports, respectively:

> "Complainant urges that the establishment of the differentials prayed is absolutely essential to the continued existence of Galveston as a port. It states that were it not for the lower rates to Galveston than to New Orleans on cotton and grain and their products from most of Texas, and on grain and its products from Santa Fe points in Oklahoma and Kansas, Galveston could not exist as a port, despite the fact that millions of dollars have been expended by the Federal Government and the people of Galveston in its development; * * *." (R. 3354-55.)

> "The belief was freely expressed by a number of complainant's witnesses experienced in the exportation of traffic through one or more Gulf ports that a complete equalization of rates on all commodities between New Orleans and the Texas ports from and to the affected territory would within a comparatively brief period have the effect of practically closing the Texas ports and diverting the traffic to the Louisiana ports, particularly New Orleans." (R. 3378.)

Now, let us compare the foregoing statements extracted from the Commission's reports with the following quotation from the testimony given by the aforesaid Santa Fe traffic official at the 1922 and 1926 hearings, respectively:

> "It is my belief that were it not for the fact that the grain from Texas, the cotton from Texas, and

> the wheat from Oklahoma points adjacent to the Santa Fe move to Galveston on a lesser rate than is available to New Orleans, there would not be any business at this port. . . . My belief is that if the rates on the traffic originating in Texas and Oklahoma were the same identical rates to New Orleans as are in effect to Galveston, within a very short period of time Galveston would be abandoned as a port, and would not serve the purpose for which this government expended a great sum of money for the purpose of developmnt." (R. 617.)
>
> "It is my view that with a complete equalization of rates to or from New Orleans as are in effect to or from Texas ports on all traffic to or from points in Texas, Oklahoma, and southern Kansas, within a very brief period practically the entire export, import, and coastwise business of these states would be handled through the Louisiana ports, and that the investment that has been made in the Texas ports would be completely lost." (R. 2276-77.)

This remarkable testimony, so far from being predicated upon an established hypothesis, is directly contrary to the existing facts as disclosed by the record. While it is customary for the Commission, under its informal procedure, to admit such unreliable and inconsequential testimony as this, often over objection, it can have absolutely no standing in a court of law or equity. There was before the Commission no proposal, contemplated or otherwise, looking to a complete equalization of the rates to and from New Orleans with those to and from the Texas ports, even as to export, import, and

coastwise traffic. South of the line of the Texas & Pacific, as will be noted by reference to Exhibit A-7, for example, there is a vast domain from which there is no expectation, or even probability, of the rates to and from the Texas ports being extended to New Orleans. This is so for two fundamental reasons, first, because the volume of the rates for the relatively short distances between points in that area and the Texas ports is, for the most part at least, too small to enable the carriers profitably to apply such rates for the longer hauls (usually through one or another of the interior Texas ports) to and from New Orleans, and, secondly, because the carriers serving that area, with one or two exceptions, serve one or more of the Texas ports with their own rails, and hence have no incentive to maintain New Orleans on a rate parity with the Texas ports with respect thereto.

Furthermore, it is the established rate policy of the Santa Fe lines (R. 1782-83) not to join in rates between interior points on their rails and New Orleans which are the same as the rates contemporaneously maintained between such points and the Texas ports. In point of fact, it is the established rate policy of the Santa Fe lines to insist that any rates that may be published by such carriers to apply on foreign and coastwise traffic moving betwen points on its lines and New Orleans, even when

on a lower basis than the current domestic rates, shall be in all instances differentially higher than the corresponding rates currently in effect between such points and the Texas ports. And its right to do so has been contested before and upheld by the Commission. See *Corporation Commission of Oklahoma* v. *Atchison, T. & S. F. Ry. Co.*, 38 Inters. Com. Rep. 33.

The obvious motive underlying this rate policy of the Santa Fe is to force the movement of the traffic over the rails of that line to the Texas ports, just as the object of the equalization rate policy of the New Orleans carriers is to attract to their lines at least a portion of the foreign and coastwise commerce originating at and destined to interior points served by them or their friendly connections. In the one instance, however, no one is seeking to obstruct the Santa Fe in the free exercise of its managerial discretion, but in the other, by an arbitrary rate order or orders, the Commission has undertaken to deny to the New Orleans lines any discretionary privileges in the making of rates on the traffic in question, and in fact has subjected their port rates to the domination and control of the Santa Fe and other Texas port lines.

We therefore say that the only evidentiary value of the testimony quoted above, or the statements of the Commission based thereon, is to indicate the extremities

to which the Commission was put to find something to justify its order requiring the New Orleans carriers and their connections to discontinue their long-continued policy of maintaining New Orleans on a rate parity with the Texas ports as to the particular traffic under review.

To illustrate even more emphatically the utter absence of any foundation for the above speculative testimony as to what *might* happen under a complete equalization of New Orleans with the Texas ports, we direct attention to the testimony of Vice-President Payne of the Texas & Pacific in connection with his Exhibits A-33 and A-34 (R. 956-60), from which it will be noted that, even under an equalization of the rates to New Orleans with those to the Texas ports, there has been a steady shrinkage in the volume of the movement of cotton to New Orleans from points on the Texas & Pacific from the 1901-02 season to the end of 1925. Thus, in the season of 1901-02, 48 per cent of the total cotton handled by the Texas & Pacific which had origin in Texas on that line and on connecting lines, or 224,784 bales, went to New Orleans, whereas in the season of 1924-25 the movement to New Orleans from the same territory, even under equalized rates, amounted to but 52,216 bales. Likewise, in his Exhibits A-37 and A-38 (R. 960-62), it was shown by this witness that there existed a substantially larger movement of cottonseed products and of

petroleum and petroleum products to the Texas ports than to New Orleans from points on the line of the Texas and Pacific more than 100 miles farther distant from New Orleans than the Texas ports.* Although entirely uncontroverted, this altogether authentic evidence received no notice whatsoever from the Commission, yet, by formal reference thereto it dignified other testimony (as quoted above) which unquestionably would have been rejected as unreliable and irrelevant by any judicial tribunal.

Assuming that this Court may properly take judicial notice of the records compiled by the Census Bureau, as additionally demonstrating that the maintenance of New Orleans on a rate parity with the Texas ports as to foreign and coastwise traffic has not hampered the growth of the latter, nor otherwise resulted in any undue prejudice to them, we submit below a comparative table of the respective populations of Houston, Galves-

*Moreover, in the face of its finding on page 362 of its 1927 report (R. 3384) that "The export movement of cotton-factory products through gulf ports during the last several years for which figures are available has been negligible, amounting in 1924 to only 86 tons, all of which moved through Galveston," the Commission nevertheless imposed on this commodity a differential of 12 cents, which is higher than that prescribed for any other involved commodity.

And at page 355 of its 1929 report (R. 3450) the Commission refers to data subsequently submitted showing that "during a 12-month period in 1927 and 1928 the export and coastwise movement of specified commodities from Texas junction points of Texas lines with the New Orleans carriers in differential territory was substantially greater to Galveston and Houston than to New Orleans," but the Commission arbitrarily declined to accord any weight to the showing so made that the equalization policy of the New Orleans carriers has not operated to deprive the Texas ports of a fair share of the traffic, even as to points directly served by the New Orleans lines.

ton, and New Orleans for the years 1920 and 1930, as taken from statistical reports released by the Census Bureau:

	Population		*Ratio of Increase*
City	*1920*	*1930*	*1930 to 1920*
Houston	138,276	292,352	111.4%
Galveston	44,255	52,938	19.6%
New Orleans	387,219	458,762	18.5%

In giving consideration to the above figures, it should be borne in mind that the 1927 order of the Commission did not become effective until in December of that year, and even then it did not apply with respect to points on the lines of the carriers appellant herein.

In a previous section of this brief we have had occasion to comment upon the Commission's discussion of the supposed natural advantages of New Orleans as a port, in which connection we pointed out that it is not within the province of the Commission to give consideration to such matters in passing upon the lawfulness *vel non* of a given rate adjustment. Since the Commission, however, in fact devoted several paragraphs to a review of the natural and commercial advantages of New Orleans, we here take occasion to direct attention to the utter absence of a similar review of the natural advantages of Galveston and the other Texas ports. This, we maintain, constitutes further indicia of the arbitrary and ruthless method followed by the Commission

in its handling and disposition of this case. The record, indeed, is replete with testimony indicating a feeling of good will toward the Texas ports, of which the following constitutes a brief though by no means complete survey.

Thus, among other things, various witnesses testified that, by reason of the shorter distances to the Texas ports than to New Orleans, a shipment could be delivered at the former in as much as 72 hours less time than to the latter (R. 1671-72, 1680-81, 1682, 1700, 2125-26, 2153-54, 2294, 2743-44, 2915), thereby resulting in a saving of interest charges, in a quicker return and greater utilization of the cars, and the like. Other witnesses testified to an interest in strengthening and building up the railroads tributary to the Texas ports (R. 1679-80, 2137), while additional reference was made (R. 1889-90) to the existence of numerous pipe lines from the interior oil fields to the Texas ports (see Exhibit A-460 reproduced in an accompanying volume, being a pipe-line map of the Southwest), and to the existence (R. 2122) of greater routing restrictions on grain through Fort Worth to New Orleans than to the Texas ports.

And lastly, but by no means the least, is the existence of a sentimental interest in the upbuilding and maintenance of the Texas ports (R. 419-20, 430, 529, 534, 539, 696-97, 702, 1655, 1704, 2133, 2172, 2204). In the case of the Texas shippers (R. 878, 879-80, 1320), this sentiment

was described as taking the form of state pride and is reflected in formal statements (R. 1626-27, 2147-48) made by two members of the Railroad Commission of Texas, but even in Kansas (R. 1655, 1704) and Colorado (R. 430) the Texas ports are looked upon as the logical and natural gateways for the exportation and importation of the foreign commerce produced and consumed in those states.

It is well here to note, and we can not say this too emphatically, that the policy of rate equalization that has been followed by the New Orleans carriers operates in no sense to deprive the Texas ports of any of the natural and commercial advantages accruing to them by reason of their proximity to and their closer association with the interior producers and consumers. Even with the same rates to and from New Orleans as are maintained to and from the Texas ports, these interior producers and consumers are wholly at liberty to prefer the Texas ports over New Orleans, if they so please. True, such voluntary rate equalization affords them the convenience of an additional gateway for the movement of their commerce, but there is nothing at all to prohibit them from making full use of the Texas ports, if they see fit so to do, on the same rates that are available through the port of New Orleans. We therefore repeat that, even though such evidence is not a legitimate subject for consideration in passing upon the lawfulness of a given

rate adjustment, the failure of the Commission to take into account the many superior natural advantages of the Texas ports, while stressing those enjoyed by the port of New Orleans, affords cumulative proof of the arbitrary nature of the Commission's decision.

We shall next undertake a review of the evidence relating particularly to our Ninth Proposition, *supra*. As the basis for a consideration thereof, we first direct attention to the reports of the Commission in *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 98 Inters. Com. Rep. 183, and *Oklahoma Corporation Commission* v. *A. & S. Ry. Co.*, 101 Inters. Com. Rep. 116. In the first of these two cases, the Commission prescribed certain mileage scales of rates on cottonseed and cottonseed products, including oil, cake, and meal, to apply in part between points in the southwestern states of Arkansas, Oklahoma, Texas, and Louisiana, being in general the same territory as to which the rate adjustment herein under review has application. In the second case cited above, other mileage scales of rates were prescribed to apply on grain, grain products, hay and straw between points in Oklahoma and Texas, there having also been under review therein the rates applying between points in Texas and Shreveport, Louisiana.

At page 133 of its report in the latter proceeding, the Commission outlined the extent to which the carriers

would be permitted to depart from the requirements of the fourth section in giving effect to the distance rates therein prescribed. Broadly stated, the Commission there said that relief from the fourth section would be given the carriers (a) where the short line does not exceed 500 miles and the longer line is not more than 70 per cent circuitous; (b) where the short line is more than 500 miles but not in excess of 1,000 miles and the longer line is not more than 50 per cent circuitous; and (c) where the short line exceeds 1,000 miles and the longer line is no more than 33 1/3 per cent circuitous. Such authorization was thereupon embodied by the Commission in its Fourth Section Order No. 9156, which, together with that portion of the Commission's said report referred to above, was reproduced herein (R. 912-15) as Exhibited A-13. Similarly, in connection with the aforesaid distance rates prescribed on cottonseed and its products the Commission granted the carriers the same fourth-section relief in its Fourth Section Order No. 9133, which was in like manner reproduced herein (R. 926-28) as Exhibit A-17 along with an identical excerpt from the Commission's report in the grain rate case referred to above.

Commenting upon the practical effect of these fourth section orders, this appellant's Vice President, Mr. Payne, pointed out (R. 915) that a longer line is thereby permitted to haul traffic 850 miles and charge for its

services the rate prescribed by the Commission for a haul of 500 miles, disregarding 350 miles additional service. More concretely, let us take the single-line rate of 33 cents so prescribed to apply on shipments of wheat for a distance of 500 miles (101 Inters. Com. Rep. 137), say, from a point in Oklahoma to Galveston. Under the fourth section relief allowed by the Commission, an indirect line or route 850 miles in length between such Oklahoma point and Galveston would be permitted to publish and maintain this 33-cent rate between those points while at the same time observing higher rates at intermediate points. Obviously, these fourth section orders must be accepted as a part and parcel of the Commission-made rates to which they relate, and by the same token reflect the considered judgment of the Commission that a *maximum* reasonable rate of 33 cents prescribed by it for a short-line haul of 500 miles is at the same time *sufficiently remunerative* to justify its observance via a route as much as 350 miles longer.

Now, without losing sight of the foregoing facts, we invite the Court's attention to the following observation on page 384 of the Commission's 1927 report herein (R. 3410):

> "No witness seriously questioned the finding, first made in *Memphis-Southwestern Investigation*, 55 I.

C. C. 515, 523, and since consistently adhered to by us, that the transportation conditions throughout Oklahoma, Arkansas, Louisiana west of the Mississippi River, and Texas common-point territory are substantially the same. The transportation conditions in southern Kansas are at least as favorable as those in the other portions of the Southwest just referred to. With these findings as a base it must follow, unless special circumstances exist with respect to particular commodities, that the differences in distance between the average hauls to the respective ports must approximate the differences in extent and cost of the service rendered by the respective carriers. We say approximate because the differences in volume of traffic and the varying degrees of efficiency in operation and management on the roads forming the various routes between this territory and the Gulf make impossible, of course, an equality of unit cost on every commodity."

What, then, does this lead us to? In authorizing the carriers to depart from the requirements of the fourth section, the Commission has said that a rate of 33 cents on wheat, based upon the short-line distance of 497 miles to Galveston (see Exhibit 17 in an accompanying volume) from Anadarko, Okla., a point southwest of Oklahoma City, may properly be applied via any indirect route from Anadarko to Galveston which does not exceed 845 miles in length. As shown by this exhibit, the distance from Anadarko to New Orleans is only 719 miles, so the Commission by its orders in this proceeding says that the carriers may not under the third section

publish the 500-mile maximum rate of 33 cents from Anadarko to New Orleans because, forsooth, the distance to New Orleans is more than 621 miles, *i. e.*, 125 per cent of the distance to Galveston. And this notwithstanding its declaration that transportation conditions throughout the states of Arkansas, Oklahoma, Texas, and Louisiana, generally speaking, are substantially the same. That being true, it must follow as surely as night does the day that any rate that is remunerative for a haul of 845 miles from Anadarko to Galveston must be more than compensatory for a haul of 719 miles from Anadarko to New Orleans. Yet, the Commission prohibits the latter under the terms of the third section while permitting a departure from the terms of the fourth section as to the former.

We can scarcely conceive in our minds of anything more demonstrably arbitrary and capricious than this.

In certain exhibits of record herein the Court will find a graphic portrayal of the contrast between the extent to which the Commission has permitted departures from the requirements of the fourth section and the restricted manner in which it has undertaken herein to interpret and apply the provisions of § 3. Let us first take Exhibit 115 (R. 716) and an accompanying map, and for illustration assume a shipment originating at Mineola, Texas. As shown in Exhibit 1 (reproduced in an accompanying volume) the short-line distance

from Mineola to Galveston is 281 miles, and from Exhibit 115 it will be noted that the single-line distance via the Missouri-Kansas-Texas from Mineola to Galveston is 492 miles. While that is more than 170 per cent of the short-line distance, this being an intrastate movement, the Missouri-Kansas-Texas is permitted to and does handle the traffic (R. 714-15) via its own line even in excess of the above circuity limitation, but on interstate movements that line is permitted under the Commission's foregoing fourth-section orders to meet the rate applying by the direct line via any route not more than 478 miles in length. On the contrary, although the distance via the Texas & Pacific from Mineola to Westwego (New Orleans) is only 419 miles, that is more than 125 per cent of the short-line distance from Mineola to Galveston, wherefore, under the third section, the Commission has compelled this appellant to maintain from Mineola to New Orleans a rate differentially higher than that which may be and is applied via the competitive line of the Missouri-Kansas-Texas for a haul 79 miles longer.

We next turn to Exhibit 116 (R. 720) and the accompanying map. In the Commission's 1927 report (R. 3418) the eastern boundary of the territory from which the carriers were directed to apply the "differential" therein prescribed (as delineated in Exhibit B-1 reproduced in an accompanying volume) extends through

Paris, Texas. The short-line distance from Paris to Galveston is 374 miles (R. 719), and hence the Santa Fe is permitted under the fourth section to publish the short-line rates from Paris to Galveston for a distance of 469 miles via its own rails, yet for a haul of only 471 miles, or approximately 125 per cent of the short-line distance from Paris to Galveston, the Commission says that under the third section it is improper for the Galveston rate to be extended to New Orleans.

But that is not all. Still keeping in view the map accompanying Exhibit 116, we desire to point out that, although not shown thereon, the line of the Santa Fe extends weswardly into New Mexico from Farwell (on the Texas border) to or near Albuquerque and thence almost due south to El Paso. If reference now be had to Exhibit A-18 (R. 929-31), it will be noted therefrom that the short-line distance from El Paso to Galveston is 859 miles, and under the 50 per cent circuity limitation authorized in the aforesaid fourth-section orders of the Commission for distances between 500 and 1,000 miles an indirect route between El Paso and Galveston as long as 1,289 miles would be permitted to meet the short-line rate to Galveston. From this same exhibit we further find that the distance from El Paso to Galveston via the Santa Fe system lines is 1,144 miles, and the distance from El Paso to New Orleans via the Texas & Pacific

is 1,147 miles, the latter being more than 125 per cent of the short-line distance from El Paso to Galveston.

Hence, under the fourth-section relief allowed by the Commission, the Santa Fe is privileged to compete with the Southern Pacific for a consignment of cottonseed cake originating at El Paso and destined to Bremen, let us say, so far as the haul from El Paso to Galveston is concerned. But, on the same shipment, for a haul only 3 miles longer via the Texas & Pacific from El Paso to New Orleans than via the Santa Fe from El Paso to Galveston, under the Commission's order herein this appellant may not meet the competition of either the Southern Pacific or the Santa Fe, but must maintain a higher proportional rate to New Orleans to the extent of the prescribed differential, namely, 5 cents per 100 pounds.

In other words, the maximum rates prescribed by the Commission on cottonseed cake and meal for distances of 859 and 1,144 or 1,147 miles, are 42 and 47 cents per 100 pounds, respectively (98 Inters. Com. Rep. 265). But for its 1,144-mile haul from El Paso to Galveston the Santa Fe is authorized to publish a competitive rate of 42 cents, while observing a higher rate at intermediate points, but for this appellant's 1,147-mile haul from El Paso to New Orleans it is prohibited by the Commission's order herein from publishing a rate lower than the domestic maximum scale rate of 47 cents. Is there any

justice in such an arbitrary and discriminatory rate requirement as this?

Lastly, we will take Exhibit 122 (R. 725) and the accompanying map. Big Sandy is a junction point of the Texas & Pacific and the St. Louis Southwestern, and, like Paris, is on the "differential" line prescribed by the Commission, as shown on Exhibit B-1. The short-line distance from Big Sandy to Galveston (see Exhibit 1 in an accompanying volume) is 277 miles. As previously stated, the rails of the St. Louis Southwestern do not extend to any of the Texas ports, but in Exhibit 122 a distance of 440 miles is shown from Big Sandy to Galveston via the St. Louis Southwestern to Waco and thence via the Missouri-Kansas-Texas. From Big Sandy to Weswego (New Orleans) the distance is 388 miles via the line of this appellant. Under the fourth-section orders of the Commission the joint-line route of 440 miles via Waco is competitive with the direct route between Big Sandy and Galveston, and the short-line rate may be extended to that route, but the orders of the Commission herein require this appellant to publish for its 52-mile shorter single-line haul from Big Sandy to New Orleans a rate "differentially" higher than that applying to Galveston via the joint-line route through Waco. Thus, under § 3 a compulsory higher rate must be maintained by this appellant for a *single-line* haul of 388 miles than is permitted under § 4 for a *joint-line* haul of 440 miles.

Assuredly, the Commission's finding herein of undue preference of New Orleans and undue prejudice to Galveston is by no stretch of the imagination measured by the transportation standard, and we have seen that that is the standard which has been laid down by this Court as the proper test of undue preference and prejudice under § 3.

Confronted with the foregoing and other equally convincing evidence, in the first Koch report the Examiner in part recommended (R. 3521) that the Commission should find that the maintenance of rates on the traffic involved to New Orleans on a parity with the corresponding rates to the Texas ports should be condemned only to the extent that the distance to New Orleans is greater than to Galveston by more than the 70, 50, and 33-1/3 per cent circuity limitations laid down by the Commission in its aforesaid fourth section orders. This limitation was apparently predicated upon the following finding of fact therein proposed by the Examiner (R. 3515), which, however, was deleted by the Commission and hence does not appear in its 1927 report:

> "In carrying out the mandate of the fourth section, that sanction be withheld from any rate applied over circuitous routes in contravention of the provisions of that section which is not reasonably compensatory, the Commission has prescribed percentage limits beyond which reasonable maximum rates applied over the short line or route between

> the competitive points will not be reasonably compensatory over circuitous lines or routes between the same points. The percentage limits so prescribed in recent years, particularly in the Southwest, have been uniformly as set forth in the second preceding paragraph, and those percentage limits have been adhered to in the conviction that they are the maximum beyond which a rate reasonable over the short line or route would not be reasonably compensatory over the circuitous line or route. This record points to the conclusion that any equalized rates applied from points in the affected territory to Louisiana ports over lines or routes which exceed the short lines or routes from the same points to Galveston by percentages greater than those recited in the second preceding paragraph are unduly low, are a burden on other traffic, and should be condemned."

Notwithstanding the above proposed finding and recommendation of the Examiner, the Commission substituted for the latter the much narrower excess distance limitation as to New Orleans over Galveston of 25 per cent, and fixed as the eastern boundary of the "differential" territory in Texas, Oklahoma, and Kansas thereby resulting the line "drawn across the map" in Exhibit B-1.

The underlying reasons which actuated the Commission in reversing the Examiner in this regard are apparently to be found on page 386 of its said 1927 report (R. 3412). There, referring to the circuity limitations

as to distance embodied in its fourth section orders, the Commission continued thus:

> "Under these authorizations the maximum circuity limitation would permit additional hauls, for instance, of 350 miles where the short-line distance is 500 miles. These [New Orleans] intervenors point to the fact that the differences in haul over the direct routes to New Orleans and Galveston from points in the affected territory are generally less than 350 miles. There is a clear distinction between a situation under the fourth section, under which differences in distance over direct and circuitous routes are in effect disregarded, and a situation like the one before us. Where a circuitous route is permitted to meet a short-line rate, the latter rate exists in any event over the short route, and no locality or shipepr is deprived of the benefit of location if longer routes are permitted to meet this competition and share in the traffic. Here we have quite a different question, namely, whether carriers which are responsible for the rates between common destinations or origin points and these rival ports can lawfully, under section 3, discriminate between the ports by giving materially more service for the same charge to one than they give to the other."

But is the Commission correct in this conclusion? Is it permissible for the Commission, in view of the emphatic declaration of this Court years ago that consideration must be given to circumstances and conditions incident to the transportation beyond the ports in dealing

with traffic such as we are here concerned with, to consider only the rail movement of the traffic to and from the respective ports, as the case may be? This obviously goes to the fundamental issue in the case. (In paragraph VII of the Petition of Intervention filed in the trial court by the Missouri-Kansas-Texas and Santa Fe system lines, it was asserted (R. 241-42) that the ports are the termini of the traffic involved herein, and that "the Commission has no jurisdiction or authority to consider the rates applicable to the ocean part of the transportation on export, import, or foreign commerce destined to or from a point or port in the United States and to or from a point in a foreign country." And in paragraph IX of said Petition of Intercention it was denied (R. 245-46) that "the Commission has erred in failing to give consideration in its decision to the water factors of rates applying upon the traffic involved in this proceeding." In the fourth paragraph of their respective Motions to Strike—R. 284—the carriers appellant herein prayed that an order be entered striking such allegations from said Petition of Intervention. As previously stated, however, the Court did not specifically act upon any of the motions to strike—R. 285.)

As stated by the Commission, in authorizing departures from the requirements of the fourth section, it recognizes the existence in any event of the lower rate over the shorter route, but the same is likewise true of

the export, import, and coastwise traffic herein under review. Regardless of whether the rail rates to and from New Orleans are equalized with those to and from the Texas ports, there is a lower *through* rate via one or more of the Texas ports in any event. Where the New Orleans rates are maintained on a parity with the Texas port rates, the traffic is still free to move through the Texas ports if the shipper shall so elect. The maintenance of New Orleans on a rate parity with the Texas ports simply affords the shipper the option of an additional route or routes, just as the fourth section orders of the Commission enable the carriers to afford shippers the benefit of optional all-rail routes. In both instances the traffic has a common origin and a common destination, and no shipper or locality is deprived of the benefit of its location if an optional route is provided as to foreign and coastwise traffic any more than where indirect routes are permitted to meet at competitive points the rates of shorter routes on domestic traffic.

Still later, at pages 352-53 of its 1929 report (R. 3447-48), the Commission again fell into substantially the same fallacious line of reasoning. Thus:

> "Under the present adjustment manufacturers of cotton ties located in this country but beyond the Southwest, which store their goods at New Orleans or the Texas ports, must pay the full domestic rates when the ties are ultimately shipped to cotton-producing territory on the lines of the New Orleans

carriers. Those rates are substantially higher from New Orleans than from the Texas ports. Imported ties, on the other hand, of which the movement is substantial, may be stored at New Orleans, their import identity retained, and shipped to the same destinations on rates which, because they have been equalized with those from Texas ports, are substantially lower than the domestic rates. Even if traffic to points on the New Orleans carriers were included in the finding of undue prejudice, the imported goods would still have an advantage because the normal differences in the domestic rates from New Orleans, on the one hand, and the Texas ports, on the other, are greater than the minimum differentials prescribed in the previous report. What has been said with respect to cotton ties also applies to iron and steel pipe and other commodities."

We have here an almost exact duplication of the contentions set up by the Commission in the *Import Rate Case, supra*. To deprive the importers of the ability to handle their importations of cotton ties through New Orleans on the same proportional import rates to points in the interior that contemporaneously apply from the Texas ports affords no benefit to the manufacurers of cotton ties in this country. It simply means that the importers would transfer their base of operations from New Orleans to one or another of the Texas ports, and the domestic manufacturer would still have identically the same competition on the lower rates applying from the Texas ports that he would have with the equalized im-

port rates applying from New Orleans. But, so far as this appellant is concerned, the movement of the imported ties would be from the Texas ports over the rails of its competitors and it would be deprived of an opportunity to participate in the traffic except to the extent that it would obtain a short haul on the relatively limited volume of movement to stations reached by its rails.

Aside from the basis of fourth-section relief discussed above, in *Import and Expart Rates*, previously cited, the Commission since its last decision in these cases has evolved an even more liberal formula for granting relief from the requirements of the fourth section with particular regard to traffic moving in export and import commerce. In that case, as we have seen, the Commission granted fourth-section relief to lines and routes operating between the south Atlantic and gulf ports, the latter including both New Orleans and the Texas ports, to enable them to compete for such traffic with lines and routes extending to and from the north Atlantic ports, while at the same time maintaining higher rates at intermediate points. After discussing the ability of the carriers to handle the traffic profitably (169 Inters. Com. Rep. 53-57), the Commission expressed the conclusion that it would be proper to grant the relief sought except as to rates less than 65 per cent of the maximum reasonable rates it had prescribed or approved for ap-

plication on like traffic in domestic commerce for corresponding distances.

Let us see, then, how this formula would work if applied to the case at bar. We again take for illustration the rates on cottonseed cake and meal shipped from El Paso. The prescribed domestic rate from El Paso to Galveston is 42 cents and from El Paso to New Orleans it is 47 cents. It so happens that the 5-cent "differential" required by the Commission herein precludes the New Orleans lines from publishing less than the full domestic rate of 47 cents, yet under the foregoing 65 per cent formula the New Orleans lines could handle the traffic from El Paso to New Orleans at a profit on a rate as low as 30.5 cents per 100 pounds. Can a more convincing demonstration than this be imagined of the arbitrary nature of the Commission's orders herein?

On pages 349-50 of its 1929 report (R. 3443-45), the Commission additionally states that in undertaking to give effect to its 1927 order the New Orleans carriers published export rates on cottonseed cake and meal from points on their lines to New Orleans the same as the rates applying thereon from such points to Houston, the latter generally being lower that the rates to Galveston, and that in some instances the New Orleans rates were even lower than the rates to Houston. We have previously had occasion to point out that, so long as the New Orleans

carriers undertook to publish rates competitive with the rates to the Texas ports, they were obliged to meet the competition where it was found to exist, in this instance through Houston. It would have been a vain and puerile act on their part merely to equalize their rates to New Orleans with those applying to Galveston when a lower rate was contemporaneously in effect to Houston.

As to the other feature, however, in the first instance, where rates were published to New Orleans lower than to Houston, the responsibility therefor is directly attributable to the Commission itself, and not to the New Orleans carriers At the time such rates were published, as stated by a witness for the Santa Fe (R. 3089, 3112), the New Orleans lines first proposed that the Texas port lines reduce the Houston and Galveston rates on cottonseed cake and meal where lower rates were published to New Orleans but "the Texas port lines flatly refused to agree" to such proposal. The New Orleans lines thereupon, through their agent, A. C. Fonda, filed with the Commission Fourth Section Application No. 13271, whereby they sought permission to depart from the requirements of the fourth section so as to enable them to increase to the level of the Houston rates their rates to New Orleans from points on their lines intermediate to more distant points from which the prescribed mileage scale produced lower rates to Houston, as pointed out (R. 3444) in the 1929 report.

Said fourth-section application was denied (R. 3298, 3444), however, but later was reopened and set for hearing along with the other proceedings (R. 3298), following which (R. 3456) it was again denied, even though the Commission has declared, and the evidence discloses, as we shall hereinafter point out in detail, that the lower equalized rate from Dallas to New Orleans is more than compensatory, and does not operate to throw a burden on other traffic. We here state most emphatically that the New Orleans carriers have no purpose or desire unnecessarily to publish *lower* rates on any of its competitive traffic to and from New Orleans than are contemporaneously applicable to one or more of the Texas ports, and had the Commission seen fit to grant the fourth-section relief so sought by them in no instance would they have published rates to New Orleans any lower that the rates contemporaneously effective to the port where the competition encountered by them was found to exist.

Another instance of these supposititious or imaginary fourth-section complications is referred to on pages 350-51 of the Commission's 1929 report (R. 3445-46). Commenting upon this situation, the Commission states that, so far as was developed at the hearing, "no serious attempt has been made to conform these rates" to the requirements of the fourth stction, but that, "regardless of what conclusion is reached upon the main issue herein, the mandate of the fourth section in this respect will have

to be obeyed." As a matter of fact, notwithstanding the immediately preceding statement of the Commission that the manner in which the New Orleans carriers complied with its 1927 order "has imperiled the rates on all Texas lines," it was developed at the 1929 hearing (R. 3114-15, 3119, 3139, 3143, 3145, 3211-12) that no shipper had made any complaint to the railroads on the subject, and it was only after the petitions for reopening and rehearing of the case were filed that any of the carriers' officials, whether of the New Orleans lines or of the Texas port lines, discovered the existence thereof on making a check of the prevailing rates. Certainly, there was nothing to warrant the statement of the Commission that these complications "imperiled" the rates on all Texas lines. For that matter, prior to the presentation of the case in the trial court in May, 1930, the New Orleans carriers worked out and published a readjustment of their rates so as to cure the maladjustment thus accidentally, as it were, brought to light. Such revised rates became effective on February 10 and March 26, 1930, and a certified copy of the tariff publications in which they were contained was filed in the lower court as Petitioners' Exhibit No. 13 (R. 3297) and has been sent up to this Court as an original exhibit.

It accordingly will be seen that the criticisms leveled by the Commission against the rate adjustment published by the carriers pursuant to its 1927 order, if not

wholly unjustified, were unduly exaggerated. In the one instance, the fourth-section complications were ironed out by means of a rate revision promptly made effective by the New Orleans carriers, and in the other instance, by a stroke of the pen, as it were, the Commission could have readily removed the cause for complaint by granting fourth-section relief. We therefore submit that in reality there was no justification for the adverse observations so made by the Commission, and same therefore merit no consideration on the part of this Court. Indeed, had the Commission not undertaken to prohibit the rate equalization of New Orleans with the Texas ports none of these complications would have been brought about at all.

We next come to one of the most impressive and persuasive indices to be found in substantiation of our contention that the Commission's ultimate finding of undue preference and prejudice, as well as its orders based thereon, was predicated not upon "the transportation standard" but upon economic conditions and other like commercial influences which may not legitimately be taken into account. We have reference to the fact that the Commission exempted from its "differential" requirement the rates on petroleum oil and its products, substantially all the movement of which to the ports is on low rates in tank cars, involving an empty return movement of the tanks equaling approximately 100 per cent of

the loaded haul, whereas on other traffic, most of which is handled in box cars, the Commission has required the observance of its prescribed "differential."

In order that the Court may adequately appreciate the full significance of this distinction, it will be necessary for us to digress momentarily for the purpose of pointing out the differences in the respective transportation conditions incident to the handling of box car traffic and petroleum oil moving in tank cars.

In undertaking to ascertain whether or not a given rate is reasonably compensatory, it has long been recognized, both by the Commission and by the courts, that no arbitrary "rule-of-thumb" method of measurement will yield satisfactory or reliable results, but that the question calls for the exercise of informed judgment, based upon the varying conditions that are constantly arising in the field of transportation. That a rate may fall within the limits of reasonableness, although not so high as to be deemed excessive nor so low as to be insufficiently remunerative to repay the expense incurred in handling the traffic moving thereon, finds clear expression in the following excerpt from the report of the Commission in the *Western Rate Advance Case*, 20 Inters. Com. Rep. 307, 315:

> "The reasonableness of a rate is to be determined by no mere mathematical calculation, though figures

> of cost and revenue must play a not inconsiderable part in arriving at a final judgment. Wise men may differ as to what a 'just and reasonable rate' is under given conditions. The courts recognize that there is abundant play for what the present Chief Justice so admirably described as 'the flexible limit of judgment which belongs to the power to make rates.' 206 U. S. 26. * * * These and similar provisions indicate that the purpose of Congress in enacting the act to regulate commerce was to establish a body whose function it should be to protect the public interest and not merely regard the technical rights of an individual shipper, and in this view of the law the act has been administered by the Commission."

Of similar import is the Commission's decision in *In Re Advances in Rates on Coal*, 22 Inters. Com. Rep. 604, at page 624, where the reference of this Court to "the flexible limit of judgment which belongs to the power to fix rates" found in *Atlantic Coast Line* v. *N. Car. Corp. Com'n*, 206 U. S. 1, 26, was again discussed.

We have previously shown that the Commission has explicitly declared that the former equalized rates to and from New Orleans were not so low as to throw a burden on other traffic. We have also shown that, under the terms of the Commission's Fourth Section Orders Nos. 9133 and 9156 the rates prescribed on grain and grain products and on cottonseed and its products in southwestern territory have been declared to be reasonably

compensatory for longer hauls to the extent of as much as 170 per cent of the short-line, rate-making distance between two given points, and a comparison of the respective distances from points on and north of the line of the Texas & Pacific to New Orleans and Galveston will disclose that in practically no instance, if at all, does the distance to New Orleans exceed that to Galveston by more than the percentages of circuity limitation imposed by such fourth section orders.

However, aside from its general finding to the effect that, broadly stated, there is not a sufficient dissimilarity of transportation conditions throughout southwestern territory to warrant a different basis of rates in one portion thereof as contrasted with another, at pages 381 of its report in *Consolidated Southwestern Cases*, 123 Inters. Com. Rep. 203, sometimes referred to as the *southwestern revision*, in which a full line of class rates, as well as rates on numerous commodities, was but recently made effective throughout the entire Southwest, the Commission in part said:

> "There are, of course, variations in the density of traffic, in the population per mile of railroad and per square mile, in the earnings per mile of road, and in other factors to which consideration should be given in determining rates. Some lines are main lines of heavy density, others are branch lines of

> less density, and still others are short-line roads, usually with comparatively little traffic."

And shortly thereafter, at page 384 of its 1927 report herein (R. 3410), the Commission similarly commented upon "the differences in volume of traffic and the varying degrees of efficiency in operation and management on the roads forming the various routes between this territory and the Gulf," which it was there said, "make impossible, of course, an equality of unit cost on every commodity."

That such is true has indeed been formally recognized by this Court in *Interstate Commerce Commission* v. *Union P. R. Co.*, *supra*, at page 551, and in *Florida E. C. Line* v. *United States*, 234 U. S. 167, at page 187.

Accordingly, much of the testimony of witnesses who appeared before the Commission on behalf of this appellant, together with many of their exhibits, was for the purpose of demonstrating that, because of peculiarly favorable operating conditions prevailing on that portion of its main line extending from Texas to New Orleans, it can and does handle this foreign and coastwise traffic at a substantial profit over and above the additional cost of service so incurred, the result being that its net earnings arising from its participation in the handling of such traffic are more than they would be did it not compete for the business.

As was stated by this appellant's Vice President, Mr. Payne, this traffic is highly competitive and is in the nature of "added traffic" which the Texas & Pacific could not hope to attract to its lines, generally speaking, except on a parity of rates between the interior points and the Louisiana ports on the one hand and the Texas ports on the other. This thought was expressed by Mr. Payne as follows (R. 1002):

> "I would think this traffic is added traffic because it is trafic which has origin in the United States and destination at a foreign port and can be moved via any port, and to move it via the port of New Orleans requires a longer haul than to move it via the port of Galveston. Therefore, we figure whether or not we can afford to meet the export rate via Galveston, that is, apply it to New Orleans on this character of traffic. If we did not apply it we would not handle the traffic, and in that way we call it added traffic. In a short time I think we would be deprived of all this traffic unless we had the same rate as Galveston."

To demonstrate to the Commission why and how this traffic can be handled by the Texas & Pacific to and from New Orleans for distances longer than those to and from the Texas ports, that line produced some rather comprehensive evidence, statistical and otherwise, which disclosed the existence of operating conditions on its main-line track extending to New Orleans peculiarly

favorable to the handling of such traffic at an unusually low *additional* cost of service.

In the first place, it was shown by Exhibit A-51 (R. 1008) that during the calendar years of 1923, 1924, and 1925, immediateley preceding the 1926 hearing, there was utilized a relatively low proportion of the rated hauling capacity of the locomotives used by appellant on its Louisiana Division, which extends (R. 1016) from New Orleans to Marshall, or almost to the eastern border of the territory from which the "differential" adjustment herein under attack was prescribed to apply. This Louisiana Division is a low grade line (R. 1017) with a ruling grade of 3-10ths of 1 per cent eastbound and 4-10ths of 1 per cent westbound, so that, with a smaller engine than is used on the western end of the line, where the grades are much heavier, trains of 4,000 to 4,500 tons (equivalent to 100 cars of 40 to 45 tons each) can be hauled.

This, however, is more than the average engine rating shown for the Louisiana Division in Exhibit A-51, but even on such lower average rating, it will be noted that during the three respective years covered by the exhibit the *utilized* engine rating on the Louisiana Division was only 68, 70 and 75 per cent eastward, and 65, 61 and 59 per cent westward. The reason for this low ratio was explained by appellant's Vice President, Mr. Somerville, as being due to lack of sufficient traffic to fill the

freight trains that it was considered necessary to run (R. 1022-23), and he further pointed out (*id.*) that, except for the foreign and coastwise traffic that was handled at that time under the equalized rate adjustment then in effect, the percentage of the engine rating that was utilized would have been even less, but with practically no saving in the operating expense.

The foregoing evidence was wholly uncontradicted, but no mention thereof appears in the reports of the Commission herein. So far as notice thereof by the Commission is concerned, it went for naught.

Additionally, by Exhibits A-45 to A-48 (R. 967-71), together with Exhibits A-53 to A-56 (R. 1010-16), identified respectively by the ranking traffic and operating officers of appellant, it was shown that there is a considerable outbound loading of traffic handled in box cars from stations on the line of the Texas & Pacific in Louisiana and on its short-line connections, and that the available supply of box cars resulting from the inbound loaded movement is generally insufficient to meet the needs of the outbound loaded movement. Accordingly, as was shown by the testimony given in support of the foregoing exhibits, as well as by the exhibits themselves, it has been found necessary to move empty box cars from points in Texas, Marshall and west, to points in Louisiana for outbound loading. Thus, in 1925 (R. 969) 3,811 empty box cars were hauled from Texas to points in

Louisiana west of Alexandria and an additional 6,958 empty box cars to points east of Alexandria.

It should be readily recognized that grain, or cotton-seed cake and meal, or any like box car traffic available for loading to New Orleans in cars which have to be moved into Louisiana in any event, particularly to points east of Alexandria, can be hauled in such cars at very little expense in addition to that which would be incurred in handling the cars empty, and hence the revenue that would be derived from such traffic, considered as "added" traffic, would be almost clear profit. As a matter of fact, this is not a novel proposition before this Court. Thus, in the so-called *Import Rate case*, *supra*, reference was made at page 206 to an allegation in the answer filed by the Texas & Pacific to the effect that during eight months of the year the preponderance of its empty-car movement is westward or away from New Orleans (the reverse of the present condition); and in *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, *supra*, the Court alluded on page 548 to a showing that, as far back as 1893, the rate on fir lumber was reduced to stimulate the loading of cars that otherwise would have been hauled empty.

By way of contrast to the operating conditions on appellant's lines in Louisiana, it was shown by Exhibits

A-49 and A-50 (R. 971-73) that on the lines of the carriers serving the Texas ports, including those supporting the complaint before the Commission, the empty box car movement is preponderantly northward, the consequence being that any additional export traffic diverted to these ports from the line of appellant will serve to increase still further this surplus northbound empty movement of box cars on those lines, while at the same time it will necessitate an increased empty movement of box cars on the line of appellant to points in Louisiana.

Not only was the foregoing testimony and statistical evidence with respect to the empty box car movement on the line of appellant wholly uncontradicted, but it was shown that other Louisiana lines encountered the same experience. Thus, a witness for the Missouri Pacific testified (R. 1095) that any appreciable disturbance of the southbound grain loading to New Orleans would doubtless make necessary the handling of that many more empty cars southbound for northbound loads, such as lumber, sugar, rice, and the like. And a witness for the Southern Pacific lines in Louisiana (R. 1139, 1141-42) testified to a similar condition on the lines represented by him.

Moreover, on cross-examination, it was admitted (R. 2273) by a statistician who testified as a witness for the Santa Fe that a few extra cars could be handled in a

train operated over the Texas & Pacific from Fort Worth to New Orleans* at approximately the same cost that would be incurred in handling such cars in a Santa Fe train being operated from Fort Worth to Galveston. And at the 1929 hearing (R. 3175) counsel for the Santa Fe indicated that in his opinion the handling of the export and import traffic in question to and from New Orleans is a source of considerable profit to the Texas & Pacific.

On the strength of the foregoing evidence, there was incorporated in the first Koch report (R. 3510-11) the following proposed finding:

> "The Texas & Pacific attempts to demonstrate that its operating conditions are such that the particular traffic under consideration may be handled by it with practically no transportation cost other than that which would be incurred by it in handling its normal flow of domestic traffic were it deprived of the opportunity to compete with the lines serving the Texas ports. It shows that during the last several years the loaded movement from Louisiana ports, exclusive of tank and sugar-cane cars, was substantially in excess of the loaded inbound move-

*At the 1929 heading, additional evidence was adduced showing much more comprehensively than at the 1927 hearing the preponderance of the southbound movement of traffic to the Texas ports over the northbound movement therefrom. See in particular the testimony of witness Reeves (R. 3155-58) with respect to the Texase & New Orleans; the testimony of witness Campbell (R. 3182-87), including his Exhibits B-50 and B-51, with respect to the Missouri-Kansas-Texas of Texas; the testimony of witness Knirr (R. 3230-35), including his Exhibits B-69, B-71, and B-72, with respect to the International-Great Northern; and the testimony of witness Cowley (R. 3238-40), including his Exhibits B-73 to B-76, inclusive, with respect to the Gulf, Colorado & Santa Fe.

ment. The figures for the 1925 are 71,356 cars inbound and 85,448 cars outbound, a difference of 14,092 cars. The empty car movement in miles of railroad-owned cars on this road for 1925 was 20,057,725 eastbound and 9,717,160 westbound, or an excess eastbound over westbound of 10,340,565. It estimates that establishment of the differentials prescribed in the original report would divert from it annually more than 100,000 tons of freight, with little if any reduction in the number of empty cars necessary for loading at New Orleans and other points in Louisiana. This would further increase the existing excess empty car movement eastbound, and it contends would enhance its operating cost by increasing the difficulty which it experiences in obtaining empty equipment for loads originating on its own rails and its short-line connections in Louisiana. On the Gulf, Colorado & Santa Fe, Missouri-Kansas-Texas of Texas, International-Great Northern, and the Trinity & Brazos Valley serving the Texas ports the loaded car movement is heavier into than out of Texas."

The Commission, however, excluded from its 1927 report all reference to the evidence so presented by appellant, not only with respect to the unusually low ratio of the utilized engine rating on its Louisiana main line in through freight train service but with respect as well to the preponderance of empty box car movement into Louisiana for use in outbound loading, even though the latter was directly brought to its attention in the Examiner's proposed report.

Such an absolute and capricious method of procedure as this has been condemned most severely by this Court. Thus, in the *Chicago Junction Case*, 264 U. S. 258, the Court in part said at page 265:

> "The provision [in the Interstate Commerce Act] for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced * * * is arbitrary action."

Again, in passing upon the validity of an administrative order of the Federal Trade Commission, in *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, the Court thus criticised at page 299 the failure of that Commission to take notice of uncontradicted evidence:

> "And since there is no testimony to the contrary and no reason appears for doubting the accuracy of observation or credibility of the witnesses, their statements should be accepted."

To like effect is the decision of this Court in *Chesapeake & O. R. Co.* v. *Martin*, 283 U. S. 209. However, so far from according full faith and credit to the foregoing evidence, the Commission at pages 381-82 of its 1927 report (R. 3406-7) seized upon certain *system* cost data of the Texas & Pacific and, based upon certain in-

volved and enigmatic assumptions, by some recondite process of reasoning raised a question as to "the wisdom from a revenue standpoint of the unrestricted policy of equalization followed by the Texas & Pacific." These *system* costs (R. 3264) are in no sense reflective of the cost of handling traffic on appellant's main line between New Orleans and Texas. We have already seen from Exhibits A-7 and A-39 (reproduced in an accompanying volume of exhibits) that this appellant's mainline stem extends directly from New Orleans to the northeastern part of Texas, and thence directly into and through the northern portion of the state out to its western limits at El Paso. It was pointed out in the same connection (R. 899) that, of the 1,953 miles of railroad owned by this appellant, several hundred miles thereof consist of branch-line tracks in Louisiana, as to which it was subsequently testified (R. 3277-78) that it would be possible for the cost per unit to be as much as four times, or even ten times, greater than on the main line.

Furthermore, the Rio Grande Division of the Texas & Pacific, which includes the extreme western portion of its line, extending from Big Spring to El Paso, a distance of 347 miles (R. 2993), is in a mountainous territory where the grade lines are heavy and the density of traffic is light (R. 1017, 3271), and because of these conditions the unit costs of operation are much higher than

on other parts of the line; indeed, this western portion of Texas is generally accorded higher rates than the remainder of the Southwest. See *Shreveport Case*, 48 Inters. Com. Rep. 344-45; also, 98 Inters. Com. Rep. 227-31. Hence, the use of the Texas & Pacific *system* costs to test the cost of handling traffic on its low grade main line in Louisiana is obviously inaccurate and misleading, and accordingly, at the 1929 hearing, appellant presented certain statistical evidence, together with supporting testimony, to demonstrate the unreliability of the cost figures used by the Commission in its 1927 report, as aforesaid.

These cost figures for the year 1926 will be found in Exhibits B-84 and B-87 (R. 3260-62), which may be briefly explained as follows: Taking first the main-line traffic on the Louisiana Division, it will be noted from Exhibit B-84 that the net ton-miles per freight-train mile amounted to 1,367.9 eastbound, and that the cost per freight-train mile amounted to $5.85, this being the average for both directions. Then, in Exhibit B-87 will be found an estimate of the cost of handling 10 per cent additional tonnage without an increase in the number of train miles, that is to say, without incurring additional train service, which is shown to effect a 4.731 per cent increase. Admittedly, a somewhat different estimate or conclusion might be reached by another witness (R. 3272), but the witness by whom such estimate was pre-

pared, who has had abundant experience in such matters (R. 3257-58, 3267), expressed the opinion (R. 3271) that the method* employed by him "if it errs at all, errs upon the side of making our cost too high, if anything, which is an error against us."

By applying the above percentage of 4.731 to the cost per freight-train mile of $5.85 taken from Exhibit B-84, the added cost per freight-train mile of handling a 10 per cent additional load is shown at the bottom of Exhibit B-87 to be 27.7 cents. The train-mile cost is then divided by the eastbound trainload on appellant's Louisiana Division main line of 1,369.9 net tons (taken from Exhibit B-84), from which it results that the added cost per net ton-mile for a 10 per cent additional trainload is 2.02 mills, or less than one-third of the average *system* cost arrived at by the Commission of handling all traffic on the Texas & Pacific for the year 1925. For the year 1927, it was similarly shown by Exhibits B-85 and B-88 (not included in the printed record) that the added cost of handling a 10 uer cent additional load on appellant's Louisiana Division main line was 2.14 mills.

However, at pages 353-54 of its 1929 report (R. 3449), the Commission rejected out-of-hand the foregoing cost estimate, saying in part:

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*This witness further testified (R. 3267) that the added cost of handling traffic to New Orleans in box cars that otherwise would be hauled empty would be "very much less" than the figures given in this exhibits.

> "These computations rest wholly upon estimates of the percentages of increase in various items of operating expenses, 32 in number, which in the opinion of the witness who formulated them would result from a 10 per cent increase in train load. Without further data in supoprt of these estimates the computations referred to are not convincing, but even if they were acceptable for the purpose intended they compare imporperly the *system* costs on both northbound and southbound on the Texas lines with the costs on eastbound traffic only on the Louisiana Division of the Texas & Pacific, on which division operating conditions are more favorable than on the lines of that carrier as a whole. No cost data for westbound traffic, with which this case is also concerned, were offered."

In thus arbitrarily declining to give consideration to the foregoing cost data, the Commission has again transgressed the holding of this Court in the cases last cited. The computations which the Commission says are not convincing are, we submit, entirely reasonable, especially when considered in the light of the other evidence of record as to empty box car movement and other operating conditions peculiar to the line of this appellant. Surely, if the Commission had any sound reason for questioning the correctness of the showing made in Exhibits B-84 and B-87, it should have had the grace to point out wherein same was defective or otherwise insufficient. Failing to do so, however, to paraphrase the words of this Court

in *International Shoe Co.* v. *Federal Trade Commission, supra*, the computations presented in the aforesaid exhibits should be accepted at their face value.

For that matter, the Commission only recntly has formally recognized the value of cost studies based upon expert opinion and sound analysis. We have reference to the following observations in its report in *Refrigeration Charges on Fruits, Etc., from the South*, 151 Inters. Com. Rep. 649, at page 672:

> "In any cost study assumptions are inevitable, a fact which is attested by the cost analyses which respondents have themselves submitted in this case. The important question is whether such assumptions as are necessary are also reasonable."

In this immediate connection, we here desire to take issue with the Commission's concluding statement that no cost data for westbound traffic were offered. By reference to Exhibit B-54 it will be noted that the westbound net ton-miles per freight train mile on this appellant's Louisiana Division main line amounted to 910.4. If this figure be substituted in Exhibit B-87 for the corresponding eastbound tonnage figure of 1367.9 and corresponding computations be made, it will be found that the cost per net ton-mile for a 10 per cent additional trainload westbound amounts to 3.04 mills. Inasmuch as the import and coastwise traffic handled westbound is

principally of a class that takes a higher level of rates than the bulk of the export tonnage, such as petroleum oil, grain, and the like, it was not thought necessary to set out the westbound costs in detail. Nevertheless, the basic data are of record, and the Commission's statement to the contrary is incorrect.

While it is true, as the Commission says, that the cost data for only the Louisiana Division of the Texas & Pacific were compared with the system costs both northbound and southbound on certain of the Texas lines, the reason for this was fully explained of record. Thus, it was stated by the witness who presented the exhibits in question (R. 3262-64) that the figures used for the other lines were taken from one of the Commission's reports, in which no separation was made between northbound and southbound movements, nor between operating divisions, but the witness did refer to the cost of handling the combined eastbound and westbound traffic on the Louisiana Division main line of the Texas & Pacific, which was given (*id.*) as 2.44 mills.

Furthermore, much of the traffic handled by the Texas port lines originates at their branch-line stations, such as Dallas, Paris and Weatherford as respects the Santa Fe, and Mineola on the Missouri-Kansas-Texas, and hence the use of their system costs is entirely proper. As to the failure show anything but the Louisiana Division costs on the Texas & Pacific, it would seem

that it might fairly be assumed that the very low cost of handling this traffic the 357 miles betweeen New Orleans and Marshall (R. 2993) would offset any higher cost that might prevail on the remainder of appellant's line in Texas. Such an assumption surely comes within the limits of reasonableness indicated in the foregoing expression of the Commission.

Apropos of the foregoing, attention is here directed to certain computations made by the Examiner and appearing in the first Koch report (R. 3511-12), but deleted therefrom before its adoption by the Commission, whereby he pointed out that during 1925 the earnings per net ton-mile derived by the Texas & Pacific on traffic received by it from its connections amounted to 4.41 mills on petroleum for an average haul of 383 miles, and to 4.35 mills on wheat for an average haul of 465 miles. The Examiner further stated that cottonseed cake and meal originated at stations on its line yielded earnings of 7.12 mills per net ton-mile for an average haul of 663 miles, thereupon adding that the foregoing "are the lowest average earnings yielded by any of this export or coastwise traffic to the Louisiana ports." After citing two decisions of the Commission wherein it lent its approval to certain low competitive rates on petroleum oil, the Examiner concluded this deleted paragraph with the following statement:

> "The earnings under the equalized rates to the Louisiana ports over the route of the Texas & Pa-

> cific are no lower than those produced by the same or lower rates applied over many of the circuitous routes from the same interior points to the Texas ports."

Let us now return to the action of the Commission in prescribing differentials on box car traffic, such as grain, flour, cottonseed cake and meal, cotton-factory products, and soap, while at the same time exempting petroleum oil from the requirements of its orders.

Petroleum oil moves on low rates in tank cars with approximately a 100 per cent empty return haul on the tanks (R. 987, 999-1000, 2217, 2294, 2301), and it stands to reason that the cost of handling such traffic is materially greater than the cost of handling traffic which is loaded into box cars that would otherwise be handled empty to New Orleans or other Louisiana ports for outbound loading.

It is obvious from this one circumstance alone, we maintain, that the Commission based its findings that the equalized rate adjustment complained of was unduly preferential of New Orleans and unduly prejudicial to Galveston and other Texas ports on commercial and economic conditions rather than upon the transportation standard. In other words, it appears self-evident that the Commission gave only scant consideration to the cost of handling the traffic and to the ability of the New Orleans carriers to handle the traffic at a profit.

In further substantiation of the foregoing statement, we now direct attention to the following statement on page 376 of the Commission's 1927 report (R. 3400):

> "Many of these interior refineries are shut down and others are operating greatly below capacity. This fact, together with the strenuous competition which the interior refiner has to meet at the ports, makes comparatively low rail rates to the Texas ports and to Baton Rouge, which is the only Louisiana port served by pipe line, an economic necessity. A review of these facts leads to the conviction that higher rates to the Louisiana ports than to the Texas ports would do serious injury to the independent refining industry in the mid-continent field."

But what about the injury that has been inflicted upon the carriers appellant herein by the "differential" orders of the Commission assailed by them? It seems manifest that their fortunes and well-being were accorded scant consideration by the Commission.

But in addition to exempting from the requirements of its "differential" rate orders herein the export movement of petroleum oil and the products thereof, the Commission only recently has decided that it would be improper to subject an import commodity, namely, blackstrap molasses, to similar requirements. See *Blackstrap Molasses from Louisiana Ports to Kansas and Oklahoma*, 171 Inters. Com. Rep. 591, decided January 6, 1931.

That proceeding had its origin in a 4-cent reduction published in 1930 by the Santa Fe lines of the import rate applying on blackstrap molasses from the Texas ports to an extensive "blanket" destination area in Kansas and Oklahoma to which a like "blanket" rate applied from New Orleans, followed by a similar reduction made by the Missouri-Kansas-Texas lines from the Texas ports.

Thereupon, the New Orleans carriers and certain of their connections published a corresponding reduction of the import rate on that commodity from New Orleans, but the Commission, upon protest, suspended the operation of the reduced rate from New Orleans to points in Kansas and Oklahoma west of the line "here drawn across the map (see Exhibit B-1). Following an investigation of the situation, however, the Commission vacated its order of suspension and permitted the reduced rate from New Orleans to become effective, thereby restoring the equalization of the import rate from New Orleans to the original "blanket" destination territory with the reduced rate published thereto from the Texas ports. With particular reference to its prior decision in cause No. 12798, referred to as the *Galveston case*, the Commission in part said at page 599:

> "We are of the view that the principles of the *Galveston case* are not so inflexible that we may not depart therefrom on a proper showing of circumstances which would warrant that action."

A review of the recited "circumstances" by which the Commission apparently was influenced to exempt this additional commodity from the "differential" requirements of its orders in said *Galveston case* indicates that in this instance the Commission gave greater consideration to the bearing that the "differential" rate adjustment which the Santa Fe sought to make effective would have upon the consumers in the interior than it did in prescribing the "differential" rate adjustment on the other commodities in the Galveston case. At all events, the Commission has now exempted petroleum oil moving for export and imported blackstrap molasses from the "differential" adjustment required as to other commodities, but nowhere do we find anything in the Commission's reports to indicate that such exemption was due to differences in the transportation standard. On the contrary, it is evident that the "differential" prescribed by the Commission as to the rates on the remaining commodities resulted from the unwarranted consideration by it of extraneous economic and commercial conditions.

It would unduly prolong this discussion to detail each and every instance of the arbitrary manner in which this case was handled by the Commission, so we shall conclude this phase of the brief by again referring to the following comments taken from the dissenting opinion of former Commissioner Hall (R. 3429):

"* * * How about undue prejudice to the shippers?

"A line is here drawn across the map. From one side of that line a man may ship at the same rate through Galveston or New Orleans, according as vessels offer or his choice inclines. From the other side of that line an obstacle of our own devising will bar the route through one port and leave him no choice except at a prohibitive differential in rate. His distance from New Orleans may be no greater than that of his competitor, who has a choice between two ports at the same rate, but if he selects New Orleans he must pay the higher rate. It needs no argument to show that such treatment of two shippers on the same rails equidistant from New Orleans, or from Galveston, as the case may be, may result in undue prejudice to one and undue preference of the other, because of that difference in relative treatment, even though all the rates are within the bounds of reasonableness."

One or two practical illustrations of what is here meant by the learned Commissioner may be helpful. Let us first take two Oklahoma points substantially equidistant from New Orleans. Sparks, which lies a short distance east of Oklahoma City, according to figures submitted by complainant (see Exhibit 17 in an accompanying volume), is 725 miles from New Orleans, and Anadarko is 719 miles from New Orleans. To Galveston the distance from Sparks is 529 miles and from Anadarko it is 497 miles. On cottonseed cake and meal the short single-line rates prescribed by the Commission (98 Inters. Com. Rep. 265) from Sparks anad Anadarko to

Galveston are 35 and 34 cents, respectively. Being located southwest of Oklahoma City and west of the line "here drawn across the map" (Exhibit B-1), Anadarko is subject to the 5-cent "differential" prescribed herein by the Commission on cottonseed cake and meal, and hence the minimum rate that may be maintaineed from that point to New Orleans is 39 cents, that being likewise the maximum reasonable rate prescribed by the Commission for distances between 700 and 750 miles. From Sparks, however, the carriers are permitted to equalize the rate to New Orleans with the 35-cent rate applying to Galveston. Consequently, for 6 miles *less* in distance a shipper at Anadarko is obliged to pay 4 cents per 100 *more* if he desires to make shipment of cottonseed cake to New Orleans than would be paid by his competitor at Sparks under an equalized rate adjustment.

Oklahoma City and El Reno are 513 and 516 miles from Galveston, respectively, and it so happens that they are each the same distance from New Orleans as Sparks. However, being on the line of the Rock Island extending from Oklahoma City to and through Amarillo, Texas, and also west of the line "here drawn across the map," these two points are subject to the 3-cent differential prescribed by the Commission on cottonseed cake and meal. From Oklahoma City and El Reno the rate on cottonseed cake and meal to Galveston is the same as it is from Sparks, to wit, 35 cents, but the following situ-

ation has been brought about under the Commission's 1927 order: A shipper of cottonseed cake and meal for export at Sparks is given a choice of either New Orleans or Galveston on the equalized 35-cent rate, but his competitor at Oklahoma City or El Reno, immediately to the west, is permitted to ship through the port of New Orleans only at a higher rate of 38 cents, and this notwithstanding the fact that the recited distance from all three of these points to New Orleans is the same, namely, 725 miles.

Coming to Texas, we will contrast Clarksville with Sulphur Springs, the former being east of the line "here drawn across the map," while the latter is west thereof. Sulphur Springs is 465 miles from New Orleans and 353 miles from Galveston (see sheet 1 of complainant's Exhibit 1 in an accompanying volume), whereas Clarksville is 460 miles from New Orleans and 408 miles from Galveston. The joint-line rate on cottonseed cake and meal from Clarksville to Galveston is 32 cents. Sulphur Springs is a local station on the line of the Louisiana, Arkansas & Texas (an appellant herein), whose rails do not reach the Texas ports, so we take the joint-line rate from Sulphur Springs to Galveston of 30 cents. Therefore, under the Commission's 1929 order herein, the minimum rate the carriers may maintain on a shipment of cottonseed cake from Sulphur Springs to New Orleans for export is 35 cents, that being actually 2 cents

higher than the *maximum* reasonable rate of 33 cents prescribed under § 1 for the single-line distance of 465 miles from Sulphur Springs to New Orleans, yet on a shipment of cottonseed cake from Clarksville to New Orleans for export the carriers may reduce the rate to the level of the 32-cent rate* applying from that point to Galveston. Small wonder that former Commissioner Hall was led to exclaim (R. 3429), "How about undue prejudice to the shippers?"

ELEVENTH PROPOSITION

The voluntary maintenance by the appellant carriers of a rate on green coffee, in carloads, from New Orleans, La., to Dallas and Fort Worth, Texas, lower than is contemporaneously in effect from New Orleans to Waco, Texas, but the same as the rate maintained by other lines from the Texas ports to Dallas and Fort Worth, they having no controlling voice in fixing the level of the rates from New Orleans to Waco, a point not reached by their rails, nor from the Texas ports to either Dallas or Fart Worth, does not as a matter of law result in undue prejudice to Waco or undue preference of either Dallas or Fort Worth.

(Germane to Assignments Nos. 5 and 6.)

(Citations are the same as under Fourth Proposition.)

*The distances used in this and the immediately preceding paragraphs are taken from exhibits filed by the complainant. The published rates may be slightly less than those stated above, due to the use of a different formula for determining the distances, but the relation of the respective rates would be substantially the same.

What we have heretofore had to say with respect to the findings and orders of the Commission in cause No. 12798, as well as what will follow in subsequent portions of this brief, has equal application in a large measure to the issues involved in No. 20685. This complaint, as previously remarked, does not relate to alleged undue preference of one port contrasted with another, but involves an issue of alleged undue preference and prejudice resulting from the maintenance by the New Orleans carriers prior to the effective date of the Commission's 1929 order of a rate of 48.5 cents per 100 pounds applying on green coffee, in carloads, from New Orleans to Dallas and Fort Worth, Texas, a rate of 57.5 cents per 100 pounds being contemporaneously applied on that commodity by other carriers (although participated in by the New Orleans lines) from New Orleans to Waco, Texas.

By reference to Exhibit B-24 (R. 3109), it will be noted that prior to December 12, 1927, the effective date of the Commission's 1927 order in cause No. 12798, a group rate of 55 cents applied on green coffee from New Orleans to Dallas, Fort Worth, Waco, Austin, and San Antonio, but on that date the rate from New Orleans to Dallas and Fort Worth became 48.5 cents, that being

the group rate applying from Galveston to the foregoing Texas destinations, and the rate from New Orleans to Waco, Austin, and San Antonio became 57.5 cents, thus reflecting the 9-cent "differential" prescribed in the Commission's 1927 order except as to points served by the New Orleans carriers.

It thus will be seen that the gravamen of the complaint in cause No. 20685 was a direct outgrowth of the differential rate adjustment prescribed in the 1927 order of the Commission. As will be seen by reference to Exhibit B-33 (R. 3150), which is a sketch map, Waco, Austin, and San Antonio are directly served from New Orleans by the Texas & New Orleans Railroad, whereas the line of the Texas & Pacific extends from New Orleans to Dallas and Fort Worth, which lie to the north of Waco.

Hence, under constraint of the Commission's 1927 order in cause No. 12798, so long as the 48.5-cent rate from Galveston (or Houston) to Waco is maintained, the carriers operating between New Orleans and Waco are obliged to maintain a rate of not less than 57.5 cents from New Orleans to Waco. Those same carriers likewise maintain (R. 3149) the rate of 57.5 cents on green coffee, in carloads, from New Orleans to Dallas and Fort Worth, they not being permitted to meet at those points without fourth-section relief the rate of 48.5 cents maintained by the New Orleans lines, although it was testi-

fied (R. 3151) that the Texas & New Orleans had pending at the time of the hearing a fourth section application seeking authority to apply said 48.5-cent rate from New Orleans to Dallas and Fort Worth over its line.

It thus will be seen that this appellant was in a position to control the rates from New Orleans to Dallas and Fort Worth, and that other lines controlled the rate from New Orleans to Waco. That is to say, the fact that the Texas & New Orleans, for example, maintained a rate of 57.5 cents from New Orleans to Dallas and Fort Worth had no influence upon the 48.5-cent rate maintained by appellant. Similarly, while appellant and its connections participate in the rate of 57.5 cents from New Orleans to Waco, it could withdraw its participation in such rate to-morrow, yet that rate would still be in effect via other routes. In other words, the situation falls squarely within the following observation of the Commission on page 386 of its 1927 report (R. 3412):

> "Where a circuitous route is permitted to meet a short-line rate, the latter rate exists in any event over the short route, and no locality or shipper is deprived of the benefit of location if longer routes are permitted to meet this competition and share in the traffic."

It appears to us that this situation is exactly parallel to that before the court in *Phila. & Reading Ry.* v. *United States*, 240 U. S. 334. In that case, it seems that

a rate of $1.35 per 100 pounds applied on shipments of cement to Jersey City, N. J., from the mill of the complaining company at Evansville, Pa., a point served only by the Philadelphia & Reading Railroad. This rate of $1.35 was participated in by other carriers which maintained a rate of 80 cents per 100 pounds to Jersey City from competitive mlls at points in the vicinity of Evansville, the Philadelphia & Reading being a party to many of such lower rates. These being the facts of record, we quote as follows from pages 340-41 of the Court's opinion:

> "* * * Neither the $1.35 rate to Jersey City nor any other participated in by the Philadelphia & Reading was declared unreasonable, either in itself or in relation to others; and there was no positive finding touching the reasonableness — intrinsic or relative—of the 80-cent schedule from 'Lehigh District' adopted by the remaining carriers.
>
> * * * *
>
> "We must assume the Jersey City rate of $1.35 is intrinsically reasonable and non-discriminatory in relation to those accorded other consuming points; and, plainly, if this were put in by all carriers, the Commission's order would be complied with and the supposed discrimination disappear. * * * If a universal rate of $1.35 could not be justly complained of by the locality, certainly *it* is not discriminated against or unlawfully prejudiced because, failing to agree, most of the carriers have established an 80-cent schedule. In the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to 'any undue or unreasonable prejudice or disadvantage.'

> "As the facts reported afford no foundation for the Commission's findings, enforcement of the order based thereon must be enjoined. * * *"

As a matter of fact, it is within the power of the carriers operating between Galveston and Waco, including the Santa Fe and the Missouri-Kansas-Texas, two of the lines which are actively aiding and abetting the complainants in both of the causes herein under review, to remove in a large degree the alleged disadvantage complained of by the Waco coffee roasters. Indeed, just as soon as the Commission extends to import traffic the operation of the rates prescribed by it in *Consolidated Southwestern Cases, supra*, Waco will be relieved to a considerable extent of the existing disability resulting from the fact that, regardless of differences in the length of haul, it is grouped with Dallas and Fort Worth on the 48.5-cent rate applying from the Texas ports on green coffee, in carloads.

The effect of the Commission's decision in that proceeding, as is pointed out on page 355 of the Commission's 1929 report, has been to place the domestic rates on almost all commodities, including most of those dealt with herein, "upon a basis which reflects distance to a much greater extent than theretofore." To illustrate what would result should the rates prescribed by the Commission in said *Consolidated Southwestern Cases* be

made applicable from Galveston on import shipments of green coffee, in carloads, we set out below a table wherein we have shown (1) the five points to which the Commission states the rate of 48.5 cents applies from Galveston, (2) the distance from Galveston to each of such points, and (3) the rates prescribed by the Commission in the so-called *southwestern revision* for the various distances so indicated, *viz.*:

From Galveston To	*Distance (Miles)	§C. S. W. Rate Per Cwt. (Cents)
San Antonio	240	42
Austin	213	40
Waco	234	42
Dallas	291	47
Fort Worth	307	48

*Taken from Exhibit 1 (in an accompanying volume), witness Thornton.

§The unabsorbed terminal charges at the ports for effecting shipside delivery would be in addition to the rates listed, being presently 1¼ cents per 100 pounds for wharfage.

Disregarding for the purposes of this discussion the increase of the above rates which would result from the addition of the port terminal charges (each rate would be increased by the same amount), we note that such a revision of the rates from Galveston would give Waco a

rate 5 cents under the Galveston-Dallas rate and 6 cents under the Galveston-Fort Worth rate. Hence, by adding to the 42-cent rate applying from Galveston to Waco the 9-cent differential prescribed in cause No. 12798, the rate from New Orleans to Waco would become 51 cents, or only 4 cents more than what would be the equalized rate of appellant from New Orleans to Dallas, and only 3 cents more than the corresponding rate from New Orleans to Fort Worth.

At all events, though, measured by the standard laid down by the Commission in the *southwestern revision*, the Santa Fe and carriers serving Waco are exacting of the coffee roasters at that point an exorbitant rate on shipments of coffee from the Texas ports, and were this rates adjustment corrected the situation complained of in the Waco case would be relieved to a material extent. Moreover, if the orders of the Commission in cause No. 12798 are enjoined and set aside, the carriers serving Waco will have greater freedom than at present to adjust their rates from New Orleans to Waco, and it would then be within their power to place Waco on a rate equality as to New Orleans with Dallas and Fort Worth precisely as they now maintain the same rates from the Texas ports to Waco that they do to Dallas and Fort Worth.

Another thought that occurs in connection with the foregoing table is this: Since the same rate on green

coffee, in carloads, is applied from Galveston (and incidentally from Houston for approximately a 50-mile shorter haul) for distances ranging from 213 to 307 miles, why should not petitioner be permitted to extend such rate voluntarily so as to encompass the somewhat greater distance from New Orleans to Dallas and Fort Worth? Indeed, under the principles of the Commission's fourth section orders to which we have previously alluded, were they made applicable to this green coffee traffic, carriers operating an indirect route between Galveston and Fort Worth 70 per cent in excess of the direct-line distance of 307 miles, or 522 miles, would be permitted to maintain the rate of 48.5 cents that now applies for a haul of only 213 miles from Galveston to Austin (and in reality for a haul of approximately 50 miles less from Houston to Austin). And yet the Commission, by its 1929 order, proposes to force appellant, against its free will and consent, to add a differential of 9 cents to said rate and compel the coffee roasters at Dallas to pay a rate of 57.5 cents for a haul of only 499 miles over its rails from New Orleans to Dallas. We feel that further comment would be superfluous.

TWELFTH PROPOSITION

The orders of the Commission under review herein contravene the due process clause of the Fifth Amendment to the Constitution of the United States.

(Germane to Assignments Nos. 12, 13h, 23 and 28.)

Interstate Commerce Commission v. *Louisville & N. R. Co.*, 190 U. S. 273, 283;

Chicago, M. & St. P. & P. R. Co. v. *Minnesota*, 134 U. S. 418;

Buchanan v. *Warley*, 245 U. S. 60, 74;

Terrace v. *Thompson*, 263 U. S. 197, 215;

State of Washington ex. rel. Seattle Title Trust Co. v. *Roberge*, 278 U. S. 116, 121;

Nectow v. *Cambridge*, 277 U. S. 183;

Northern P. R. Co. v. *North Dakota*, 236 U. S. 585, 595-98;

Allgeyer v. *Louisiana*, 165 U. S. 578;

Liggett Co. v. *Baldridge*, 278 U. S. 105, 111;

Interstate Commerce Commission v. *Union Pacific*, *supra;*

Interstate Commerce Commission v. *Northern Pacific R. Co., supra;*

United States v. *Chicago, M. & St. P. & P. R. Co.*, 282 U. S. 311, 329;

Bentham's Theory of Legislation, Ch. 8, p. 111.

The present controversy, we continue to insist, has nothing whatsoever to do with domestic shipments but

relates exclusively to foreign and coastwise traffic moving through certain gulf ports. In both the original and the amended complaint the rates charged on various commodities shipped to and from shipside Galveston were attacked as unjust, unreasonable, and unjustly discriminatory against the port of Galveston and the individual shippers using said port, and unduly preferential of New Orleans, Louisiana, Mobile, Alabama, Port Arthur, Texas, and other Texas gulf ports, and the individual shippers using said ports. At the hearing the allegations relating to unreasonableness were withdrawn, as also were the charges of undue preference of Port Arthur and the other Texas gulf ports. Complainants also eliminated the commodities of cotton, cotton linters and smelter products from consideration.

After the elimination of the unreasonableness of the rate and the charges of undue preference of Port Arthur and other Texas gulf ports (other than Galveston), the complaint became confined to and was solely determined upon the question as to whether or not an equalization or a parity of rates as between the Texas ports and the Louisiana ports constituted a violation of paragraph (1) of section 3 of the Interstate Commerce Act, as amended February 28, 1920.

The reasonableness of the rates both to the Texas ports and the Louisiana ports is conceded, and no attack whatsoever is made upon the reasonableness of the rates,

which are conceded to be reasonable *per se*. The purpose sought by the complaint, as is evidenced by same, is to abrogate a condition which has existed since Galveston, Houston, and the other Texas ports became ports, arising from the practice of The Texas and Pacific Railway Company of maintaining an equality or a parity of rates to and from points on its line for import, export, and coastwise business as between the Texas ports and the Louisiana ports. The complainant alleges and has undertaken to prove that the maintenance of such a parity or equality of rates as between the Texas ports and the Louisiana ports, gives an undue or unreasonable preference or advantage to the Louisana ports, and subjects the Texas ports to an undue or unreasonable prejudice or disadvantage. The purpose of the complaint is to divert certain traffic heretofore moving upon an equality of rates as between the Louisiana ports and the Texas ports through the Texas ports exclusively.

The Commission in its various orders which are attacked herein has undertaken to put in certain differentials on some fifteen (15) commodities, these differentials running from 1 cent to 12 cents per one hundred pounds. These differentials compel this traffic, when moving through the port of New Orleans, to take a higher rate to the extent of the differentials than if it moved from the same points or was destined to the same points when moved through the ports of Texas. In other

words, the purpose of the Commision's order is to say that when this traffic moves from a certain defined territory it *must* move through the ports of Texas. Unless this is the purpose and effect of the order, the order would be put an empty gesture. Unless the order does have this effect, the relief sought by the complaint has not been granted and the intention of the Commission's order in this case is of no effect.

The Texas and Pacific Railway Company does not serve any of the Texas ports over its own rails. It has no controlling voice in making rates to and from any of the Texas ports, and, as stated above, it has always had a parity of rates as between the Texas ports and the Louisiana ports and did so until prohibited. The Commission in its various findings leading up to the assailed orders has found that the effect of the differentials ordered by them to be maintained by the railroads will divert import, export, and coastwise traffic from the port of New Orleans and move same through the port of Galveston. Witnesses for The Texas and Pacific Railway Company, whose evidence is undisputed, to wit, Mr. Lynch (R. 730) and Mr. Payne (R. 1002), have testified that the effect of these differentials will prohibit any movement of this traffic from points on the Texas and Pacific through the port of New Orleans; that these orders will have the same effect as if the Commission had handed down an order expressly stating that traffic from this defined

territory should not move through the port of New Orleans at all.

The territory specified by the Commission includes points from which the distance to New Orleans exceeds that to Galveston by approximately more than 25 per cent. This limitation includes practically all of the line of The Texas and Pacific Railway Company in Texas. It does include all of the large shipping centers in the state of Texas. The Texas and Pacific Railway Company has forty (40) different junction points with lines directly serving the Texas ports. These junction points serve a population, according to the 1920 census, of 471,410, as compared with a total population of 40,297 at other open stations on the lines of the Texas & Pacific. As the purpose of the complaint is to divert this traffic from the lines of the Texas & Pacific and the purpose of the order is to divert same from the lines of the Texas & Pacific, it logically follows that the Texas & Pacific will not enjoy any of this traffic whatsoever, but would be deprived of the right to solicit, receive, and enjoy same, and enjoy the revenues therefrom. To that extent, it is deprived of the free, fair, and just use of its property. In fact, as to this class of business, it will be inhibited from using its property in any manner whatsoever in the movement of same, and this deprivation of the right to use its property constitutes a taking of its property without due process of

law in violation of the Fifth Amendment to the Constitution of the United States.

Bentham, in his "Theory of Legislation," page 111, chapter 8, under the head of "Property", says:

> "We shall see that there is no such thing as natural property, and that it is entirely the work of law. Property is nothing but a basis of expectation; the expectation of deriving certain advantages from a thing which we are said to possess, in consequence of the relation in which we stand towards it. The idea of property consists in an established expectation; in the persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case. Now this expectation, this persuasion, can only be the work of law. I can not count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest."

This Court has repeatedly held that depriving one of the use of property is in substance and effect the taking of property itself without due process of law and in violation of the Constitution of the United States. (See case *Chicago &c. Railway Company* v. *Minnesota*, 134 U. S. 418, at page 458 of the opinion.) In that case the Court was reviewing a statute of the state of Minne-

sota, which provided that the rates or charges for the transportation of property recommended and published by the Commission shall be final and conclusive as to what are equal and reasonable charges. The Court in further discussing the case stated that such a statute deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice. (See page 457 of the opinion.)

In the various cases that have been brought attacking the reasonableness of rates of state commissions, this doctrine has been repeatedly confirmed; that is, that rates must be reasonable, and the carrier is entitled to earn a fair return on its investment. In this particular case, the carrier is prohibited from performing its charter duties; it is prohibited from handling traffic tributary to its own line at all; it is deprived of the right of charging anything whatsoever for this traffic, for, under the evidence in this case, if it is required to charge a higher rate than the traffic can be moved on through another port, it is prohibitory of its move-

ment and in effect declaring that it shall not move over the line of this carrier. That traffic may be expected "to move along the line of least resistance" was unequivocably and unquestioningly given judicial recognition in *Interstate Comm.* v. *Louisville &c. R. R.*, 190 U. S. 273, at page 283.

This Court has also repeatedly held that the right to use and enjoy the use of property comes within the protection of the due process clause of the Fifth Amendment as to the federal government and the Fourteenth Amendment as to the state governments.

In *Buchanan* v. *Warley*, 245 U. S. 60, the Court invalidated a city ordinance forbidding colored persons to occupy houses in blocks where the greater number of houses were occupied by white persons, as violating the due process clause of the Fourteenth Amendment. The Court said (p. 74):

> "The Federal Constitution and laws passed within its authority are by the express terms of that instrument made the supreme law of the land. The Fourteenth Amendment protects life, liberty, and property from invasion by the States without due process of law. Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. *Holden* v. *Hardy*, 169 U. S. 366, 391. Property consists of the free use, enjoyment, and disposal of a person's acquisitions without control or

diminution save by the law of the land. 1 Blackstone's Commentaries (Cooley's Ed.) 127."

In *Terrace* v. *Thompson*, 263 U. S. 197, the question involved was the validity of a state statute prohibiting aliens from owning or leasing real estate. Although the statute was sustained, the Court said (page 215):

"The Terraces' property rights in the land include the right to use, lease, and dispose of it for lawful purposes (*Buchanan* v. *Warley*, 245 U. S. 60, 74, 62 L. Ed. 149, 160, L. R. A. 1918C, 210, 38 Sup. Ct. Rep. 16, Ann. Cas. 1918A, 1201), and the Constitution protects these essential attributes of property (*Holden* v. *Hardy*, 169 U. S. 366, 391, 42 L. Ed. 780, 790, 18 Sup. Ct. 383), and also protects Nekatsuka in his right to earn a livelihood by following the ordinary occupations of life (*Truax* v. *Raich*, 239 U. S. 33, 37, 38, 60 L. Ed. 131, 133, 134, L. R. A. 1916D 545, 36 Sup. Ct. Rep. 7, Ann. Cas. 1917 B, 283; *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, 29 A. L. R. 1446, 43 Sup. Ct. Rep. 625). If, as claimed, the state act is repugnant to the due process and equal protection clauses of the 14th Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellant, as to which they have no remedy at law which is as practical, efficient, or adequate as the remedy in equity."

In *State of Washington ex rel. Seattle Title Trust Co.* v. *Roberge*, 278 U. S. 116, the Court held invalid a zoning ordinance prohibiting the right to use property within certain areas, except for certain purposes, but excepting therefrom the right to use for building a philanthropic home for children and old people, if two thirds of the owners of the property within four hundred feet thereof consented thereto. The Court said (page 121):

> "The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution."

In *Nectow* v. *Cambridge*, 277 U. S. 183, the Court held that a zoning ordinance violated the provisions of the due process clause of the Fourteenth Amendment.

In *Northern Pacific Ry.* v. *North Dakota*, 236 U. S. 585, the Court held invalid, as violative of the due process clause, a statute of North Dakota fixing maximum intrastate rates on coal in carload lots, even though there was no showing that the returns from the entire intrastate business were insufficient. The Court said (pages 595-596, 598):

> "But, broad as is the power of regulation, the State does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public purposes, or to the

same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it can not be required to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demended such carriage. The public interest can not be invoked as a justification for demand, which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement. In such a case, it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain. Thus, in *Lake Shore & Michigan Southern Ry.* v. *Smith*, 173 U. S. 684, the regulation as to the sale of mileage books was condemned as arbitrary without regard to the total income of the carrier. Similarly, in *Missouri Pacific Ry.* v. *Nebraska*, 217 U. S. 196, it was held that the carrier could not be required to build mere private connections, and the adequacy of the receipts from its entire business did not enter into the question. And this was so because the obligation was not involved in the carrier's public duty and the requirement went beyond the reasonable exercise of the State's protective power.

* * * *

"The State insists that the enactment of the statute may be justified as 'a declaration of public policy.' In substance, the argument is that the rate was imposed to aid in the development of a local industry

and thus to confer a benefit upon the people of the State. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the State, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the State may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier had in no way agreed. It does not aid the argument to urge that the State may permit the carrier to make good its loss by charges for other transportation. If other rates are exorbitant, they may be reduced. Certainly it could not be said that the carrier may be required to charge excessive rates to some in order that others might be served at a rate unreasonably low. That would be but arbitrary action. We can not reach the conclusion that the rate in question is to be supported upon the ground of public policy, if, upon the facts found, it should be deemed to be less than reasonable."

In *Banton* v. *Belt Line Railway Corp.*, 268 U. S. 413, the Court held invalid an order of the Public Service Commission establishing street railway rates, as vio-

lating the due process clause. The Court said (page 421):

> "While the carrier has no constitutional right to the same rate or percentage of return on all its business, the State may not select any class of traffic for arbitrary control and regulation. Broad as is its power to regulate, the State does not enjoy the freedom of an owner. Appellee's property is held in private ownership; and, subject to reasonable regulation in the public interest, the management and right to control the business policy of the company belong to its owners."

In *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, the Court said (pages 564-66):

> "Third. The main contention of plaintiff is that, as the carriers had in 1916 reduced the rate from 80 cents to 65 cents, neither the carriers nor the Commission had power to increase the rate without a prior finding by the Commission upon proper hearing 'that such proposed increase rests upon changed conditions other that the elimination of water competition;' and that no such hearing had been had or finding made.
>
> "In construing this provision it is important to bear in mind the limits of the Commission's control over rates. Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates; that is, the power, in the first instance, to fix rates or to increase or to reduce them. Legislation of Congress confers now upon the Commission ample powers to prevent by direct action the

exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits public carriers from charging more than reasonable rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, 196-197; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.*, 168 U. S. 144, 161. Effective control was not secured until the Act of 1906 had given to the Commission the power to fix, after such hearing, the rate which should be charged; *Interstate Commerce Commission* v. *Humbolt S. S. Co.*, 224 U. S. 474, 483; and the Act of 1910 had given it power to suspend, during investigation, tariffs for new rates, and placed upon the carrier the burden of proof to establish the reasonableness of the increased rates. *M. C. Kiser Co.* v. *Central of Gergia Ry. Co.*, 236 Fed. Rep. 573.

"Congress, however, steadfastly withheld from the Commission power to prevent by direct action the charging of unreasonably low rates. The common law did not recognize that the rate of a common carrier might be so low as to constitute a wrong; and Congress has declined to declare such a rule. Despite the original Act to Regulate Commerce and all amendments, railroads still have power to fix rates as low as they choose and to reduce rates when they choose. The Commission's power over them in this respect extends no further than to discourage the making of unduly low rates by applying deterrents. One such deterrent is found in the fact that low

rates, because voluntarily established by the carrier, may be accepted by the Commission as evidence that other rates, actual or proposed, for comparable service, are unreasonably high. *Board of Trade of Carrollton, Ga.* v. *Central of Georgia Ry. Co.*, 28 I. C. C. 154, 164; *Sheridan Chamber of Commerce* v. *Chicago, Burlington & Quincy R. R. Co.*, 26 I. C. C. 638, 647. Compare *Louisville & Nashville R. R. Co.* v. *United States*, 238 U. S. 1, 11 *et seq.* The voluntary making of unremuneratively low rates in important traffic may also tend to induce the Commission to resist appeals of carriers for general rate increases on the ground of financial necessities. But the main source of the Commission's influence to prevent excessively low rates lies in its power to prevent unjust discrimination. Compare *Houston, East & West Texas Ry Co.* v. *United States*, 234 U. S. 342. The order prohibiting the unjust discrimination however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained, the rate applicable to the locality or article discriminated against must be reduced. That is, the carrier may remove the discrimination either by raising the lower rate to the relative level of the higher, or by lowering the higher to the relative level of the lower, or by equalizing conditions through fixing rates at some intermediate point. *American Express Co.* v. *Caldwell*, 244 U. S. 617, 624."

In declaring unconstitutional a Louisiana statute which undertook to impose certain restrictions upon the privilege of writing marine insurance in that state, in *Allgeyer* v. *Louisiana*, 165 U. S. 578, the Court at pages 289-90 placed the following interpretation upon the scope

and meaning of the Fourteenth Amendment, in which the "due process" clause is worded substantially the same as it appears in the Fifth Amendment:

> "The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.
>
> "It was said by Mr. Justice Bradley in *Butchers' Union S. H. & L. Co.* v. *Crescent City, L. S. L. & S. H. Co.*, 111 U. S. 746, 762, in the course of his concurring opinion in that case, that 'the right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; and among these are life, liberty, and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned justice said: 'I hold that the liberty of pursuit -the right to follow any of the ordinary callings of life--is

one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the priviliges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him, to a certain extent, of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty' as contained in the 14th Amendment.

"Again, in *Powell* v. *Pennsylvania*, 127 U. S. 678, 684, Mr. Justice Harlan, in stating the opinion of the Court, said: 'The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The Court assents to this general proposition as embodying a sound principle of constitutional law.' It was there held, however, that the legislation under consideration in that case did not violate any of the constitutional rights of the plaintiff in error."

And finally, in *Liggett Co.* v. *Baldridge*, 278 U. S. 105, at page 111, it was definitely declared in so many words that business is a property right, and as such is entitled to protection against legislation in contravention of the

due process clause of the Constitution, in that case the clause incorporated in the Fourteenth Amendment, citing *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 465, and *Truax* v. *Corrigan*, 257 U. S. 312, 327.

In point of fact, we submit that the constitutional right to do business without let or hindrance is so firmly rooted in our system of jurisprudence that, so far from it being within the power of the Commission to do so, we maintain that it is beyond the power of Congress by legislative act to deprive the carriers appellant herein, under the facts developed of record, of their right to publish and maintain rates to and from New Orleans on the traffic in question which will enable them to participate in the handling thereof in competition with other lines serving the Texas ports. In support of the foregoing assertion, we cite the recent decision of this Court in *United States* v. *Chicago, M. & St. P. & P. R. Co.*, 282 U. S. 311, 327, and quote therefrom as follows:

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 S. Ct. 622; *United States* v. *Joint Traffic Asso.*, 171 U. S. 505, 571, 572, 43 L. ed. 259, 288, 19 S. Ct. 25; *Adair* v. *United States*, 208 U. S. 161, 180,

> 52 L. ed. 436, 445, 28 S. Ct. 277, 13 Ann. Cas. 764. Both the liberty of contract and the right to property here are involved. The contract was valid and had been so adjudged by the court having jurisdiction of the foreclosure and sale. The parties to it were willing and were entitled to have the contract executed according to its terms. There is no power in any department of the government to order otherwise."

The Fifth Amendment, inter alia, ordained that,—

> "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

The original Constitution did not contain this provision, but, shortly after the enactment of the original Constitution, encroachments from the general government were feared, and this fear led to the speedy adoption of the first amendments to the Constitution. Justice Miller, in the *Slaughter-House Cases*, 16 Wall. 36, 82 says: "The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at this time from the federal power." These amendments were promised and insisted upon. "I hope," said Jefferson, "that a Declaration of Rights will be drawn up to protect the people against the federal government, as they are already protected in most cases against the state government."

The language of the Fifth Amendment was no new language or language of uncertain meaning. It was taken purposely from Magna Charta itself. The 39th chapter of that document provides that "no freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land." Judge John F. Dillon, in his work on the Laws and Jurisprudence of England and America, says as to this provision: "It was language not only memorable in its origin, but it had stood for more than five centuries as the classic expression and as the recognized bulwark of 'the ancient and inherited rights of Englishmen' to be secure in their personal liberty and in their possessions. It was, moreover, language which shone resplendent with the light of universal justice; and for these reasons it was selected to be put into the Fifth Amendment of the federal Constitution, as it had already been put into the charters and constitutions of the several states. Thus we see a general, fixed, and settled purpose in both the state and federal constitutions to protect and secure personal liberty, contracts, and private property."

And with respect to constitutional provisions of this nature, it was well said by Mr. Justice Bradley, speaking for the Court, in *Boyd* v. *United States*, 116 U. S. 616, 635: "* * * Illegitimate and unconstitutional

practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"

The language used in the Fifth Amendment with respect to the rights of property is happily chosen. The entire amendment is a series of negations, denials of right or power in the government—in this instance, to take property without due process of law, and we could add without just compensation, for depriving The Texas and Pacific Railway Company of its right to use its property is in effect the taking of its property.

THIRTEENTH PROPOSITION

The maintenance of the gulf ports on a rate parity as to foreign and coastwise traffic does not violate but is strictly in consonance with the requirements of section 500 of the Transportation Act, 1920, and of section 8 of the Merchant Marine Act, 1920, and, in holding that the maintenance of such ports on a rate parity is in contravention of the provisions of said statutes, the Commission has placed an erroneous interpretation upon the meaning thereof.

(There was no specific Assignment of Error on this point.)

On page 122 of the Commission's 1925 report (R. 3360-61) there appears the following:

> "In section 500 of the transportation act, 1920, it is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation. Of the same tenor are the provisions of section 8 of the merchant marine act, 1920. The facilities for water transportation from or to and at Galveston can not be preserved in full vigor under a rate adjustment which unduly favors New Orleans. It is important that all ports be kept open and in as vigorous a condition as possible so that water lines may be attracted thereto and the public given the cheapest and most efficient service, both by water and by rail."

Similarly, on page 379 of its 1927 report (R. 3404) the Commission further says: "It is a familiar principle

that each community is entitled to the benefits arising from its natural advantages. But another principle, equally well settled, is that a carrier may meet competition so long as it * * * does not contravene the declared policy of Congress to foster and preserve in full vigor both water and rail transportation."

In what way the maintenance of the respective gulf ports on a *parity of rates* as to foreign and coastwise traffic gives one port an unlawful advantage over another, or does violence to the provisions of either of the foregoing statutes, is in no sense clear. Nowhere in the statutes is it contemplated that traffic shall be diverted, by means of an arbitrary rate order, from one port to another, or that one port shall be so favored by legislative fiat at the expense of another. Neither is there anything in the record to warrant the Commission's insinuation that the policy of rate equalization of the gulf ports has brought about "a rate adjustment which unduly favors New Orleans" over Galveston.

Whether the traffic in question moves through New Orleans or through one or the other of the Texas ports has no bearing upon the congressional policy laid down in these statutes. The obvious purpose and intent underlying the enactment thereof was to promote and encourage inland water transportation, and it can scarcely be considered that the Congress remotely had in mind ocean transportation. But, be that as it may, whether

the traffic moves through New Orleans or through the Texas ports the water service is to all intents and purposes the same, and as respects the rail transportation the only resulting difference is to forbid or destroy carrier competition by a forced diversion of the traffic from the carriers serving one port to those serving a rival port or ports, thereby conferring upon the latter a monopolistic grasp upon the traffic in question. We have already seen, though, that the Supreme Court finds nothing in the law which an intent to achieve such a consequence can be imputed to the congressional mind.

FOURTEENTH PROPOSITION

When called upon to pass upon the validity vel non of an administrative order of the Interstate Commerce Commission, assailed as being either unsupported by the evidence or contrary thereto, or both, it is not sufficient for the district court to accept as binding upon it the findings and conclusions set out in the report and opinion of the Commission, but it is the affirmative function and duty of the court to examine and review the evidence before the Commission (when made available) to ascertain whether the assailed order was based upon substantial evidence, and if such evidence is not sufficient for that purpose to enjoin the enforcement of the order in question as being void and without legal sanction.

(Germane to Assignments Nos. 16 and 17.)

Interstate Commerce Commission v. *Union Pacific R. Co.*, *supra*;

Virginan R. Co. v. *United States*, 272 U. S. 658, 674, 675;

Lawrence v. *St. Louis-S. F. R. Co.* 274 U. S. 588, 596,

Cleveland, C., C. & St. L. R. Co. v. *United States*, 275 U. S. 404, 414;

Baltimore & O. R. Co. v. *United States*, 279 U. S. 781, 787;

Wisconsin R. R. Comm. v. *Maxcy*, 281 U. S. 82, 83;

Panama Mail S. S. Co. v. *Vargas*, 281 U. S. 670, 671-73;

Equity Rule No. 70 1/2, effective October 1, 1930 (Adopted June 2, 1930).

By the Urgent Deficiencies Appropriation Act of October 22, 1913, ch. 32, 38 Stat. 208, 219-20 (U. S. C., Tit. 28, § 41 [28], 47 and 48a), provision has been made by the Congress for the institution of a proceeding in equity to restrain the enforcement of any order or orders of the Interstate Commerce Commission. This legislation, by its terms, contemplates a hearing before a special court of three judges, at least one of whom shall be a Circuit Judge. In *Interstate Commerce Commission* v. *Union Pacific R. Co.*, *supra*, it was said at page 547-48 that, in passing upon the legality of an order of the Commission, the court confines itself to the ultimate question as to whether the Commission acted within its power, and will not examine the facts further than to determine whether there was substantial evidence to sustain the order. In such cases, however, before the court can say whether there was sufficient evidence before the Commission to support an assailed order entered by it, it obviously is necessary for the court to review the record made before the Commission in order to determine for itself whether the assailed order finds adequate support in the facts developed by the Commission in its investigation.

In the case at bar the carriers appellant attack certain orders made and entered by the Commission, alleging in part that they are both unsupported by and are contrary to the evidence presented to that tribunal, and in substantiation of their charges filed with the trial court a certified copy of a voluminous record consisting of some 8,000 typewritten pages of testimony and between 900 and 1,000 exhibits. It is evident from the opinion prepared and filed by the trial court, however, that no pretense was made by the court of having examined the record to determine whether there existed therein sufficient facts upon which the assailed orders of the Commission might lawfully be predicated. On the contrary, it will be noted from said opinion (R. 3571-81) that the trial court accepted as sufficient for its purpose various statements extracted from the reports made by the Commission and quoted in the court's opinion.

But this manifestly is altogether insufficient to support or justify a decree of dismissal in a case of this nature. The fundamental question to be determined was whether the findings of the Commission are supported by substantial evidence. True, it is the position and contention of appellants that the Commission's evidentiary findings of fact do not support its ultimate finding or conclusion as to the existence of undue preference and prejudice, but that contention was rejected by the trial court, and it thereupon became the duty of the court to

review the record to ascertain whether the Commission's evidentiary findings of fact were supported by adequate evidence. But this the court did not do.

In fact, the case was argued before the court on May 1 and 2, 1930 (R. 3670-71), and its opinion was filed on June 16, 1930 (*id.*), the interval between the two events being scarcely more than six weeks. Commenting upon the failure of the trial court to file a written opinion, in *Virginia R. Co.* v. *United States, supra*, this Court concluded its written decision with the following observations:

> "Unless an opinion indicating the ground of the decision is delivered, a defeated party may often be unable to determine whether the case presents a question worthy of consideration by the appellate court. This is particularly true where the case is in equity and the decree is entered upon a hearing involving complicated facts. For, being in equity, matters of fact as well as of law are reviewable; and the reviewable issues of law are rarely sharply defined by requests for rulings."

In other cases cited above, this Court has further remarked upon the desirability of having the benefit of written findings by the trial court, and finally, in *Wisconsin R. R. Comm.* v. *Maxcy, supra*, this Court remanded the cause to the trial court with instructions calling for the preparation by the latter of written findings of fact and conclusions of law. And thereafter, by order

entered June 2, 1930, this Court promulgated a new Equity Rule directing that, in deciding suits in equity, the court of the first instance shall find the facts specially and state separately its conclusions of law thereon. This rule was not made effective until October 1, 1930, however, and hence the disposition made by the trial court of this case was not subject thereto. Had the trial court undertaken an analysis of the evidence before the Commission and later submitted to the court, the deficiencies and weaknesses in the Commission's evidentiary findings must have become patent, and for that reason alone its orders herein under attack should thereupon have been set aside and held for naught.

CONCLUDING REMARKS

At page 216 of its opinion in the *Import Rate case*, *supra*, this Court said:

> "It is also obvious that, if the Commission does have the power, of its own motion, to promulgate general decrees or orders which thereby become rules of action to common carriers, such exercise of power must be confined to the obvious purposes and directions of the statute. Congress has not seen fit to grant legislative power to the Commission."

And thereafter, at page 234, the Court added that, "if the Commission * * * proposes to promulgate general orders, which thereby become rules of action to the carrying companies, the spirit and letter of the act require that such orders should have in view the purpose of promoting and facilitating commerce, and the welfare of all to be affected, as well the carriers as the traders and consumers of the country," thereupon saying:

> "It may be said that it would be impossible for the Commission to frame a general order if it were necessary to enter upon so wide a field of investigation, and if all interests that are liable to be affected were to be considered. This criticism, if well founded, would go to show that such orders are instances of general legislation, requiring an exercise of the law-making power, and that the general orders made by the Commission in March, 1889, and January, 1891, instead of being regulations calculated to promote commerce and enforce the express provisions of the act, are themselves laws of

> wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy."

It is true that, since the foregoing decision was rendered, the powers and authority conferred upon the Commission have been very greatly enlarged, but at the same time, as we have hereinabove conclusively demonstrated by the decisions of this Court, in no instance has the Congress undertaken to deprive the carriers of their managerial discretion in the operation of their property and in shaping their rate policies. On the contrary, this Court has repeatedly pointed out that there is nothing to be found in the Interstate Commerce Act, or in the various amendments thereto, which evidences any intention on the part of the Congress to limit or restrict the freedom of competition among the carriers. Indeed, as late as 1925, by the so-called Hoch-Smith Resolution, ch. 120, 43 Stat. L. 801 (U. S. C., Tit. 49, § 55), the Commission was admonished that in adjusting freight rates so far as legally possible to do so the Commission should seek to provide rates whereby commodities may freely move. Such, however, is not the policy that was pursued by the Commission in the cases herein under review.

In the principal complaint before the Commission herein under review, aside from what has hereinabove been said with reference to the arbitrary manner in which

the case was handled and disposed of by the Commission, we now take occasion to point out that, disregarding the evidence relating to the special circumstances and conditions, whereby it was shown that individual lines serving New Orleans can profitably handle the traffic in question at the same rates which are applied to the Texas ports, the Commission has promulgated a general prohibitory order which denies *any* carrier the right to compete on an equality of rates with the lines serving the Texas ports for the handling of such traffic through the port of New Orleans. We do not question the power of the Commission, where the out-of-pocket cost of the rail transportation to or from New Orleans as to a given commodity or as to designated interior points of origin or destination is in fact more than the revenue derived from the handling of such traffic, to enter an order prohibiting in the public interest the movement of such traffic through the port of New Orleans.

Thus, in the first Koch report (R. 3512-13) the Examiner cites several instances of long and indirect hauls of grain and petroleum oil from Kansas and Oklahoma points to New Orleans over the Santa Fe or Missouri-Kansas-Texas system lines (incidentally through one or more of the Texas ports), and these lines, it is interesting to note, are among those which are seeking before this Court to uphold the assailed orders of the Commission. It was there further remarked that the rate on grain

from Anthony, Kans., applying to both Galveston and New Orleans via short three-line routes of 637 and 876 miles, respectively, likewise applied to New Orleans through both Kansas City and St. Louis for distances of 1282 and 1360 miles, respectively. For reasons best known to itself, however, the Commission did not choose to incorporate said paragraph of the first Koch report in its own 1927 report. The point we make, though, is that, if the traffic can not be handled profitably by such unduly circuitous and out-of-line routes, the Commission might require the discontinuance thereof, leaving the traffic to move to New Orleans by the shorter and less expensive direct routes.

By way of conclusion, this appellant desires to make it clear that it neither has nor seeks a quarrel with Galveston or any of the Texas gulf ports. As a carrier traversing the entire state of Texas from its eastern to its extreme western border, it has at heart the interests of the inhabitants of that commonwealth; it greatly rejoices in their prosperity and in that of the Texas ports, and is desirous of encouraging and promoting the development of its resources. This it believes, however, can best be accomplished by allowing to the fullest possible extent the free interplay of competition among the carriers serving the many growing and thriving communities (the Texas ports included) that are scattered throughout its broad expanse, one of which carriers is appeallant.

We believe it inimical to these principles to undertake to carve out a designated portion of the state, or of the Southwest as a whole, and thereupon give to certain carriers or groups of carriers a monopolistic grasp upon the traffic (or any portion thereof) moving to and from points in that area, thereby excluding appellant from an opportunity to participate therein. In short, we maintain that, as this Court has repeatedly declared, there is nothing in the Interstate Commere Act conferring upon the Interstate Commerce Commission the power and authority to deprive a carrier of the right and opportunity to compete on an equality of rates with other carriers under the circumstances and conditions disclosed of record herein, or to destroy or limit its managerial functions over the regulation and conduct of its business.

It is perhaps fitting here to set out the dissenting opinion of Circuit Judge Foster (R. 3581-82), *viz.*:

> "The rates which the order of the Commission changes have been in effect for years notwithstanding which Galveston has held her own and Houston has grown immeasurably as a port. The other Texas ports are negligible except as to the movement of oil. This traffic is exempted from the order, a somewhat inconsistent ruling. No doubt, as affecting a division of rates, a longer haul constitutes additional service to be paid for, but as affecting a shipper seeking to move his goods to and from the seabord within reasonable limits, which do not seem to be exceeded in this case, it is immaterial and hardly to be considered service. It is evident that the

commission did not base its order merely on the additional length of haul but took into consideration the superior natural advantages of New Orleans and its greater facilities as a port. It is conceded that the plaintiffs carry the import and export traffic at a profit and without any undue burden upon other traffic. On the other hand it is reasonably certain that if forced to inaugurate higher export rates to New Orleans than to Texas ports, none of which they reach over their own lines, their revenues will suffer greatly through loss of tonnage. I fail to see how the plaintiffs can be guilty of undue preference to New Orleans, or undue prejudice to Texas ports by charging the same rate to both. The Commission was not authorized to equalize port advantages by an adjustment of rates. We have jurisdiction to review the order and it should be set aside. *Central R. R. Co.* v. *U. S.*, 257 U. S. 247."

"For these reasons I respectfully dissent."

And also, from the dissenting opinion of former Commissioner Hall (R. 3430) we take the following paragraph:

"Galveston and New Orleans do not pay the rates. Their export or import houses, their brokers or factors, their bankers, their warehousemen and stevedores, may render helpful service in the exporting or importing of goods, but that does not give them a right to demand that traffic be made to flow through one or the other of those ports for their benefit and gain, and that carriers be debarred from according equal facilities at equal rates to those who ship and pay the freight."

Therefore, premises considered, since the orders of the Interstate Commerce Commission assailed herein transcend the power and authority resposed in that tribunal and are both contrary to and unsupported by the evidence in many particulars, we submit that it devolves upon this Court to set aside the decree of dismissal entered by the court below and thereupon to remand the cause to that court with instructions that it enjoin, set aside, annul, and suspend such orders, and each of them, in accordance with the prayer of the respective petitions, which is hereby brought forward and renewed.

Respectfully submitted,

T. J. FREEMAN,
T. D. GRESHAM,
ESMOND PHELPS,
ROBERT L. W. THOMPSON,
Solicitors for said Appellant.

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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted] /

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA AND ARKANSAS RAILWAY COMPANY, AND LOUISIANA RAILWAY AND NAVIGATION COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal From the District Court of the United States for the Southern District of Texas.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, INTERVENER-APPELLANT.

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Attorney General of the State of Louisiana.

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Solicitors for Interveners.

SUBJECT INDEX

	Pages
Statement	2, 7
Report and Order of December 23, 1929, and of June 29, 1927	7, 17
I.	
The Orders of the Commission Attacked Herein and Sought to be Annulled Are Unsupported by Evidence and Are Invalid	17, 24
II.	
Since the Texas & Pacific is an Independently Operated Railroad, and the Commission Has so Held, it Cannot be Found Guilty of a Violation of Section 3 Because it Adopts the Policy of Serving its Only Port at Rates Which Are Equal to Those Applying at Galveston on This Particular Description of Traffic	24, 30
III.	
Before a Carrier Can Be Deemed Guilty of a Violation of Section 3, it Must Be Shown by Convincing Proof That the Particular Carrier is Responsible for Both the Adjustment Which Creates the Alleged Undue Preference and the Undue Prejudice. Where a Carrier Is Not Responsible for the Act Which Causes the Undue Preference or Prejudice, it Cannot Be Held Responsible for an Alleged Violation of Section 3	30, 40
IV.	
To Bring a Violation of Section 3 Under the Control of the Commission, the Prejudice or Preference Must Be Undue, and Is Not Illegal Unless Shown by the Evidence That it is Not Justified by the Cost of the Respective Services, by Their Values or by Other Transportation Conditions	40, 41

V.

Pages

The Commission Is Not Authorized to Prescribe Differentials Unless They Are Based Upon a Finding Under Section 1 of the Interstate Commerce Act, That the Rates Themselves Are Just and Reasonable, or Unless Predicated Upon a Finding as to Just and Reasonable Rates..... 41, 48

VI.

The Orders of the Commission Complained of, for the Reasons Stated, Give a Preference to the Ports of the State of Texas Over Those of the State of Louisiana, and Are, Therefore, in Conflict with Article I, Section 9, Clause 5 of the Constitution of the United States 48, 53

VII.

Rate Adjustments Which Prevent the Movement of Traffic Freely Over a Direct Route to a Port of Importance, Is Not in Accord with the Dictates of Congress 53, 73

VIII.

Conclusion 73, 78

AUTHORITIES CITED

	Pages
Akron C. & Y. R. Co. v. United States (New England Division Case, 261 U. S. 184, 67 L. ed. 605)	20
Anchor Coal Co. v. United States, (25 F. (2nd) 462)	57, 59
American Express Company v. South Dakota (244 U. S. 617, 61 L. ed. 1352, 1357)	33
Armour Packing Company v. United States (209 U. S. 56, 52 L. ed. 681, 694)	51
Ashland Fire Brick Co. v. Southern Ry. Co. (22 I. C. C. 155)	35
Atchison, Topeka & N. R. Co. v. Southern Railway Company (148 I. C. C. 708)	28
Boston Chamber of Commerce Case (95 I. C. C. 539)	36
Central Railroad Company of New Jersey v. United States (257 U. S. 247, 66 L. ed. 217)	33, 35, 43, 45, 70
Chicago Lumber & Coal Company v. T. S. R. Ry. Co. (16 I. C. C. 323)	31
Chicago, M. & St. Paul Ry. Co. v. Minneapolis C. Association (247 U. S. 490, 62 L. ed. 1229)	24, 26
Chicago I. & L. Ry. Co. v United States, (270 U. S. 287, 70 L. ed. 590)	43, 16
Constitution, Article I, Section 9, Paragraph 5	6, 50, 53
Crews v The Richmond & Danville Railroad Company (1 I. C. C. 401)	31
East Tennessee, Virginia & Georgia Railroad Company v. Interstate Commercee Commission (181 U. S. 1, 45 L. ed. 719, 725)	33
Farley Loetcher Mfg. Co. v. Director General (73 I. C. C. 70)	35

Pages

Fernwood & Gulf Case, (United States v. I. C. R. R. Co., 263 U. S. 515, 68 L. ed. 417) 23, 38, 39, 40

Florida Log Rate Case, (282 U. S. 194) 21

Galveston Commercial Assn. v. A. & V. Ry. Co., (77 I. C. C. 388, 395) 64

Galveston Commercial Association v. Galveston, H. & S. A. Ry. Co., (128 I. C. C. 349, 160 I. C. C. 345) 7, 9, 60

Hoch-Smith Resolution (43 Stat. L. 801, U. S. Code, title 40, Sec. 55) 30, 54

Hughes Creek Coal Co. v. Kanawha & Michigan Railway Company (29 I. C. C. 671) 27

Interstate Commerce Act, as amended by Transportation Act, 1920, (U. S. title 49, sec. 3) .. 9, 20, 70, 71

Interstate Commerce Commission v. Diffenbaugh (222 U. S. 42, 56 L. ed. 83) 32

Interstate Commerce Commission v. Louisville & Nashville Railroad Co., (227 U. S. 88, 57 L. ed. 433) 21

Interstate Commerce Commission v. Stickney (215 U. S. 98, 54 L. ed. 112) 26

Lake Cargo Coal Rates (101 I. C. C. 513; 126 I. C. C. 309) 37

Manufacturers R. Co. v. United States, (246 U. S. 457, 481, 62 L. ed. 831, 844, 38 Sup. Ct. Rep. 383) 24

Munn v. Illinois (94 U. S. 238, 24 L. ed. 77) 52

M. L. & T. R. R. & S. S. Co. v. Louisiana (118 U. S. 455, 306 L. ed. 237, 242) 37, 52

McGrain v. Dougherty (273 U. S. 135, 71 L. ed. 580, 593) 26

Pages

Peary & Company v. Union Pacific Railroad Company (176 Fed. 409) 32

Pennsylvania v. the Wheeling & Belmont Bridge Company (18 How. 435, 15 L. ed. 435, 438) 51

Penn Refining Company v. Western New York & Penn R. Co., (208 U. S. 208, 52 L. ed. 456) 32

Pullman's Palace Car Company v. Missouri Pacific Railroad Company (115 U. S. 587, 59 L. ed. 499) 24, 25

Richmond Chamber of Commerce v. Seaboard Air Line (44 I. C. C. 455, 463) 35

St. Louis S. W. Ry. Co. v United States, (245 U. S. 136, 62 L. ed. 199) 43, 44

Shreveport Case (H. E. & W. T. R. Co. v. United States) (234 U. S. 342, 58 L. ed. 1341) 23, 43, 76

Shreveport Chamber of Commerce v. H. E. & W. T. R. Co., (23 I. C. C. 31) 44

Southern Pacific R. Co. v. I. C. C., (219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283) 57

Swift Lumber Co. Case, (United States, et al. v. Illinois Central R. Co. 263 U. S. 515, 68 L. ed. 417) 23

Texas & Pacific Ry. Co. v. I. C. C., (162 U. S. 197, 40 L. ed. 940) 58, 70

United States v. Illinois Central Railroad Company (263 U. S. 515, 68 L. ed. 417) 23, 38, 39, 40, 43, 47

United States v. N. Y. C. R. Co., (263 U. S. 603, 44 Sup. Ct. 212, 68 L. ed. 470) 57

West v. United States (258 Fed. 418) 27

Wisconsin Case, (Wisconsin v. C. B. & Q. R. Co. 257 U. S. 563, 66 L. ed. 371) 21

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 24.

THE TEXAS AND PACIFIC RAILWAY COMPANY, LOUISIANA AND ARKANSAS RAILWAY COMPANY, AND LOUISIANA RAILWAY AND NAVIGATION COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

Appeal From the District Court of the United States for the Southern District of Texas.

BRIEF ON BEHALF OF THE STATE OF LOUISIANA, INTERVENER-APPELLANT.

May it please the Court:

The case below is reported in 42 Fed. (2nd) 281.

The reports of the Interstate Commerce Commission are found in 100 I. C. C. 114, 115; 128 I. C. C. 366; 160 I. C. C. 349.

The State of Louisiana intervened in the cases below, (R., 251, 253, 259, 268, 270), and under a general order of the court were allowed to participate in these proceedings without further notice to the parties.

STATEMENT.

The State of Louisiana, as owner of extensive public docks, wharves, warehouses, grain elevators, cotton warehouses and the public belt railroad at the port of New Orleans, has a vital interest in having the orders of the Interstate Commerce Commission attacked in the bill of complaint, set aside and enjoined as prayed for in the bills of complaint.

The errors and points upon which the State of Louisiana relies are as follows:

(1) That the district court erred in entering a decree in the consolidated cases below, Nos. 186 and 187, in the United States District Court, for the Galveston Division of the Southern District of Texas, refusing to grant the relief prayed for by the petitioners.

(2) That the said district court erred in failing and refusing to hold that the orders of the Interstate Commerce Commission, made in case No. 12,789, entitled the *Galveston Commercial Association v. Galveston, Harrisburg, and San Antonio Railway Co., et al.*, on June 24, 1925, was arbitrary, unreasonable, unlawful, unjust, and void, and in

violation of the provisions of the Interstate Commerce Act, and the 5th Amendment to the Constitution of the United States.

(3) That the district court erred in failing and refusing to hold that the orders of the Interstate Commerce Commission issued in the said numbered and entitled cause before the Interstate Commerce Commission on the 29th day of June, 1927, on the 23rd day of December, 1929, were arbitrary, unreasonable, unlawful, unjust and void, and in violation of the Interstate Commerce Act and of the "Due Process of Law" clause of the 5th Amendment to the Constitution of the United States.

(4) That the district court erred in failing and refusing to hold that none of the aforesaid orders of the Interstate Commerce Commission were supported by any substantial evidence as to the unreasonableness of rates from points in Texas on appellants' lines to New Orleans, and of injurious discrimination against Texas ports in favor of New Orleans, La.

(5) That the district court erred in failing and refusing to find, as a matter of fact, that the evidence in the record established beyond a reasonable doubt that the rate adjustment complained of did not make or give any undue or unreasonable preference or advantage to any shipper or locality or any particular description of traffic, and did not subject any shipper or locality or traffic to an undue

or unreasonable prejudice or disadvantage in any respect whatsoever.

(6) That the district court erred in failing and refusing to hold that the aforesaid orders of the Interstate Commerce Commission are not supported by evidence and are therefore void.

(7) That the district court erred in failing and refusing to hold that the aforesaid orders of the said Commission were without any evidence to support the same, and beyond the authority of the Commission to make.

(8) That the aforesaid orders were unsupported by substantial evidence and that there was no evidence in causes Nos. 12789 and 20685 on the docket of the Commission showing or tending to show any undue or unreasonable preference or advantage or any undue prejudice or disadvantage growing out of the rates therein assailed, either to the ports of Texas or to the port of New Orleans, and the court erred in not holding that the aforesaid orders are without effect and void.

(9) That the court erred in failing and refusing to hold that the aforesaid orders are void because the Commission had exceeded its powers, had proceeded along an erroneous theory of law, and that its action is manifestly arbitrary and unreasonable, and transcends the authority conferred upon the Commission by law and the same should have been set aside and annulled by the court.

(10) That the district court erred in failing and refusing to hold that the Commission's said orders were void because it appears in the record that in fixing the certain differentials provided for in the said orders in favor of the Texas ports as against the port of New Orleans, for the purpose of arbitrarily favoring the Texas ports against the port of New Orleans, were manifestly for the purpose of forcing traffic through the Texas ports and diverting it from the port of New Orleans, and away from the rail carriers herein directly serving the port of New Orleans, but not directly serving the ports of Texas.

(11) That the district court erred in failing and refusing to hold the Commission's aforesaid orders void for the reasons that:

(a) The said orders ignore the element of actual carrier competition.

(b) That said orders are based merely upon differences in distance of rail-haul to and from gulf ports.

(c) That said orders ignore all transportation conditions between inland points and foreign or coastwise points other than mere differences in distance of rail-haul.

(d) That said orders deny rail carriers serving New Orleans the exercise of managerial discretion as to whether they will meet carrier competition.

(e) That said orders ignore the interests of shippers of export traffic from points in the interior, of

> shippers and receivers of coastwise traffic, and of receivers of import traffic at interior points; these interests are arbitrarily disregarded and subordinated to the interests of the Texas ports and exporters and importers doing business at Texas ports, and therefore are unjustly discriminatory against the port of New Orleans and its importers and exporters.

(12) That the district court erred in not holding that the said orders give an undue preference and advantage to the Texas ports and are unduly preferential to and unjustly discriminate against the port of New Orleans.

(13) That the district court erred in failing and refusing to hold that the said orders of the Commission violate Article 1, section 9, clause 5, of the Constitution of the United States, reading in part as follows:

> "No Peference shall be given by any Regulation of Commerce to the Ports of one State over those of another."

(14) That the district court erred in failing and refusing to hold that the said orders are void for the reason that they are arbitrary, unreasonable, and unjust, and are unsupported by and are contrary to the findings of fact and evidence in the case, and are also contrary to the intent, purposes, and provisions of the Interstate Commerce Act, particularly Section 3 thereof.

(15) That the said district court erred in failing and refusing to hold that the said orders of the Commission will, if enforced, prevent the free movement of coastwise

export and import traffic through the port of New Orleans, and deprive the applicant railroads of their legal and just right to serve the port of New Orleans by charging, demanding, and collecting on traffic to the said port from points on their respective lines just, reasonable, and nondiscriminatory rates.

REPORT AND ORDER OF DECEMBER 23, 1929, AND OF JUNE 29, 1927.

The report and order of the Commission issued under date of December 23, 1929, (R., 182), finds the rates on a number of commodities in export, import, and coastwise movement "from or to points in Texas on the lines of the Texas & Pacific and the Louisiana Railway & Navigation Company of Texas, (now Louisiana & Arkansas Railway Company of Texas), are and for the future will be, unduly prejudicial to Galveston and the other Texas ports taking the same rates, and unduly preferential of New Orleans." (160 I. C. C. 359, R., 3438, 3456).

The Commission then finds that,

> "this undue prejudice should be removed by establishing, from or to interior points in Texas from which the short-line distances to New Orleans do not exceed those to Galveston by more than approximately 25 per cent, rates to or from Galveston or other Texas ports taking the same rates, as the case may be, which do not exceed the contemporaneous rates on the same commodities to or from New Orleans; and by establishing, from or to interior points

> from which the short-line distances to New Orleans exceed those to Galveston by more than approximately 25 per cent, rates to or from Galveston and other Texas ports taking the same rates, as the case may be, which do not exceed rates which are less than the contemporaneous rates on the same commodities to or from New Orleans by the differentials prescribed on the respective commodities named on pages 389, 390 of the previous report, the distances to or from the respective ports of Galveston and New Orleans to be determined in the manner prescribed in that report."

An order was accordingly entered.

In its report of June 29, 1927, 128 I. C. C. 349 (R., 3367), the Commission excepted points on the Texas & Pacific and Louisiana Railway and Navigation System, Oklahoma and southern Kansas from its finding of undue prejudice to Galveston and other Texas ports taking the same rates, and of undue preference of New Orleans. (R., 3416). This report and the order of the same date of which it was made a part, was revised by the report and order of December 23, 1929, above referred to.

There is no finding in any of the reports of the Commission that the rates from points on the Texas & Pacific and Louisiana Railway & Navigation Company's lines to New Orleans are unjust or unreasonable, and no finding that rates to Galveston are just and reasonable.

The main questions in the case are (1), whether the Texas & Pacific and the Louisiana Railway & Navigation

Company may serve the port of New Orleans at just and reasonable rates, and whether in doing so they can be condemned for a violation of section 3 (1) of the *Interstate Commerce Act*, as amended by the *Transportation Act*, 1920, *U. S. C. title 49, sec. 3*, which provides,

> "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

and, (2), whether, in the absence of evidence showing that the alleged discrimination is unduly prejudicial to the port of Galveston and other Texas ports taking the same rates and unduly preferential of the port of New Orleans, the Commission's order should be sustained and the bills dismissed.

We contend that the lower court was wrong on both of these points.

PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

In the case of *Galveston Chamber of Commerce v. the Galveston Harrisburg & San Antonio Railway Company, the Texas & Pacific Railway Company, the Louisiana Railway & Navigation Company of Texas, and the Louisiana*

Railway & Navigation Company, serving directly the Port of New Orleans, Louisiana, and numerous other railroads serving the port of Galveston, Texas, and the Port of New Orleans, Louisiana, either directly or through connecting lines, No. 12798 upon the docket of said Commission, and in the case entitled *Cooper Grocery Company v. Angelina & Natchez River Railroad Company*, the Commission issued certain orders respectively on the 25th day of June, 1927, on the 29th day of June, 1927, and on the 23rd day of December, 1929, which orders are attacked in bills of complaint filed by the Texas & Pacific Railway Company against the United States, (No. 186), (R., 3), and by the Louisiana & Arkansas Railway Company against the United States, (No. 187), (R., 95), in the district court of ... United States, Galveston Division, Southern District of Texas.

The proceedings before the Commission briefly were as follows:

By its said order of June 24, 1925, entered in the said proceedings, the Commission, through its Division 2, required the defendants therein, on or before October 8, 1925, to cease and desist and thereafter to abstain from publishing, demanding and collecting for the transportation of export, import, or coastwise movement of commodities named in the said order, from or to the points named therein, rates from or to shipside at Galveston, which reflect relationship with the contemporaneous rates from or to shipside at New

Orleans, different from those specifically prescribed in said order, in instances where the difference in distance from or to the Port of New Orleans, over Galveston, exceeded 100 miles, and requiring the defendants, including the Texas & Pacific Railway, the Louisiana Railway & Navigation Company of Texas, and the Louisiana Railway & Navigation Company, to revise and correct their rates on a number of commodities accordingly. (R., 70).

In due course, the appellants herein, joined by certain other of the defendants in the proceedings before the Commission, applied to the Commission for a rehearing of the issues involved in said proceeding No. 12798, and further asking the Commission to set aside and annul its report and order as handed down by the Division 2, on June 24, 1927. Other parties filed similar applications, and on November 3, 1927, the Commission ordered that said proceeding No. 12798 be opened for further hearing; but refused to suspend the effective date of its said order of June 24, 1925. The carriers then proceeded to revise their tariffs and published the rates as ordered by the Commission. Thereafter, the complainants herein and certain other defendant carriers filed with the Commission their respective petitions asking that the said revised tariffs, rates, schedules, and items published therein, be suspended, so far as they proposed higher rates to and from the Port of New Orleans than to and from the Port of Galveston, insisting that the same were not published voluntarily; but only by compul-

sion of the said order of the Commission. Numerous other parties filed petitions for suspension, including the Louisiana Public Service Commission, the New Orleans Joint Traffic Bureau, and many shippers and traffic organizations located at interior points, whose interests would have been seriously affected adversely by the rates so published under the said order of said Commission.

On June 29, 1927, the Commission handed down its report and order in the said proceeding (128 I. C. C. 349), (R., 3367), in which it found that the said suspended rates and tariffs were not justified, and required their cancellation without prejudice to the filing of new schedules (except as to petroleum and petroleum products), in conformity with the conclusion expressed in said order. Further order was entered in said proceeding No. 12798 directing and requiring the defendants, on or before December 12, 1927, to cease and desist and thereafter to abstain from publishing, demanding and collecting for the transportation in export, import and coastwise movement of certain specified commodities, (except petroleum and petroleum products), in carloads, from or to interior points from which the distances determined as provided in said order to New Orleans, exceed those from the same points to Galveston by more than approximately 25 per cent, rates which are less by the minimum differentials therein specified than the corresponding rates contemporaneously maintained from

or to shipside at New Orleans, and required the carriers to revise and correct their rates accordingly. (R., 76).

The Texas & Pacific Railway Company, the Louisiana Railway & Navigation Company of Texas, and the Louisiana Railway & Navigation Company, were exempted from the said order in so far as export, import and coastwise traffic originating or terminating on their respective lines was concerned, in which respect the order of June 24, 1925, 100 I. C. C. 110, was set aside and annulled.

Subsequently, certain defendants and interveners filed with the Commission petitions seeking corrections and modifications in the aforesaid order of June 29, 1927, and the proceedings were reopened and further hearings held on the following questions:

1. Whether the Texas & Pacific Railway Company is controlled by the Missouri Pacific Railway Company.
2. Whether the Texas & Pacific Railway Company and the Louisiana Railway & Navigation Company of Texas and the Louisiana Railway & Navigation Company should be exempt from the finding of undue prejudice made with respect to such carriers on June 29, 1927.
3. Whether the Weatherford, Mineral Wells and Northwestern Railway Company, the Denison and Pacific Suburban Railway Company, the Cisco & Northeastern Railway, the Abilene & Southern Railway Company and the Pecos Valley Southern Railway Company should be exempt from the finding of undue prejudice made with respect to such carriers on June 29, 1927.

The Cooper Grocery Company and others filed, on February 6, 1928, their complaint with the Commission against a number of carriers, including the Texas & Pacific Railway Company, No. 20685 on the Commission's docket, alleging that the rate on green coffee, carloads, from New Orleans, Louisiana, to Waco, Texas, is and for the future will be unreasonable and unduly prejudicial to them, and that the rate on green coffee, carloads, contemporaneously maintained from New Orleans, Louisiana, to Dallas and Fort Worth, Texas, is unduly preferential of their competitors at those points, (R., 3460). This case was consolidated and heard with Case No. 12798.

Further proceedings before the Commission were had on these consolidated cases, testimony was taken, and, in due course, the Examiner who heard the case filed a proposed report, which was served upon the parties, (R., 44). Exceptions to the said proposed report were filed, and oral argument was heard thereon before the entire Commission on November 13, 1929.

On December 23, 1929, the Commission handed down its second report and order in said proceedings, setting aside and reversing that portion of its order of June 29, 1927, in Case No. 12798, by which the Texas & Pacific Railway Company, the Louisiana Railway & Navigation Company of Texas and the Louisiana Railway & Navigation Company, were exempted from its provisions and requirements, and directed the said carriers, with the other defendants in

said consolidated cases, on or before March 31, 1930, to cease and desist, and thereafter abstain, from publishing, demanding or collecting for the transportation in export, import or coastwise movement, as the case may be, of the commodities, in carloads, specified therein from or to points on those lines from which the distances to New Orleans, determined as therein designated, exceed those from the same points to Galveston by approximately more than 25 per cent, rates to or from shipside at Galveston, Texas, and other Texas ports taking the same rates which reflect relationships with the contemporaneous rates to or from shipside at New Orleans, Louisiana, that are less than the differentials therein prescribed under such rates to or from shipside at New Orleans, Louisiana, and requiring the said defendants to revise and correct their tariffs accordingly. The said defendants by said order of December 23, 1929, were further required, on or before March 31, 1930, to cease and desist, and thereafter to abstain from publishing, demanding or collecting for the transportation of green coffee, in carloads, from New Orleans, Louisiana, to Waco, Texas, a rate which shall exceed the rate contemporaneously maintained and applied on the same commodities from New Orleans, Louisiana, to Dallas and Fort Worth, Texas, (R., 87).

Suits were then filed by the Texas & Pacific and Louisiana Railway & Navigation Company in the district court of the United States for the Southern District of Texas, against

the United States, the Interstate Commerce Commission, and the carriers, subject to the aforesaid orders attacking their validity on numerous grounds.

The State of Louisiana intervened on behalf of the complainants and joins them in their appeal in seeking to have the enforcement of the aforesaid orders perpetually enjoined and annulled.

By a 2-1 decision, the lower court resolved the controversy into two questions for decision, viz.:

> "(1) Whether the Commission had evidence before it sufficient to support its finding of fact that under the circumstances disclosed by the evidence the maintenance of through rates, import, export, and coastwise, to New Orleans the same as to the Texas ports, in the face of a considerably longer distance haul to New Orleans, constituted an undue preference of the port of New Orleans and an undue prejudice to the Texas ports, and
>
> (2) Whether, though petitioners do not reach the Texas ports with their rails, they could be guilty of discrimination against such ports, because of their participation in joint through rates to such ports."

After reviewing the proceedings before the Commission, and discussing the issues at length, the two district judges, concurring, dismissed the bill, and concluding their opinion, say:

> "In short, it seems plain to us that where the Commission has in a painstaking and careful way regarded and considered all the facts and circumstances developed in this voluminous record, and has in its order, with a due regard to those facts and circumstances, provided for the abolition not of all the discrimination, but only of that part of it which it finds to be undue by allowing the rates to New Orleans, where they do not exceed 25 per cent. of the distance from Galveston, to still remain the same as to Galveston, that this court has no authority to substitute its own administrative judgment as to how much more or how much less distance would be undue in a case of this kind, full as it was of facts bearing upon the creation and balancing of rate structures and the relations of rates, for that of the Commission, informed, equipped and authorized to discharge that function. It is therefore our opinion, and we find, that plaintiffs' bills are without equity, and should be dismissed." (R., 3571).

Judge *Foster*, Circuit Judge, dissented. (*post*).

The opinion below, concurred in by two district judges, Circuit Judge Foster dissenting, (42 F. [2nd] 281), was rendered June 16, 1930, (R., 2571). The final decree dismissing the petitions was entered June 16, 1930. (R., 3582).

I.

THE ORDERS OF THE COMMISSION ATTACKED HEREIN AND SOUGHT TO BE ANNULLED ARE UNSUPPORTED BY EVIDENCE AND ARE INVALID.

There was no evidence before the Commission to support a finding or order that the equalized rate adjustment

as between New Orleans and Galveston has created any undue prejudice to the Port of Galveston or other Texas ports, or is unduly preferential to the Port of New Orleans.

The orders complained of are based entirely upon differences in distances to New Orleans and to Galveston. The order requires certain differentials in favor of Galveston over New Orleans in all cases where the mileages to New Orleans are approximately 25 per cent greater than mileages to Galveston. Mileage alone is not a measure by which undue preference or prejudice can be judged, and where, as in this case, it is shown that the disregarding of mileages by individual lines reaching New Orleans which do not reach Galveston, in order to equalize the rates to and from New Orleans with those to and from Galveston, has worked no injury to Galveston or other Texas ports, the orders fixing such differentials are arbitrary and baseless.

Undue preference to New Orleans and undue prejudice against Galveston would result in traffic leaving Galveston and going to New Orleans. This could not happen under an equalized rate adjustment, unless, on acount of some economic condition beyond the control of the Commission, the freight was attracted to the Port of New Orleans, away from Galveston. Such, for instance, as more modern facilities for handling freight to and from shipside, more up-to-date warehouses, more space, better switching facilities,

and like physical conditions that tend to induce freight to seek one port against another, under equalized rates to and from the competitive ports.

But the foreign and coastwise traffic has not, under the equalized freight rates, left Galveston for New Orleans. On the other hand, *the Commission by its arbitrary orders, unsupported by any evidence that the equalized rates had unduly prejudiced, or even injured Galveston,* has caused New Orleans to lose valuable tonnage for its publicly owned and operated docks, the revenues from which are pledged to pay the principal and interest of outstanding bonds, failure in which will throw upon the State of Louisiana an extra burden of paying these bonds and interest thereon from revenues derived from additional taxes.

When these bonds were issued, the State of Louisiana had every reason to assume, and did assume, that the policy of over thirty years' standing, under and by which the direct lines serving New Orleans had kept the Port of New Orleans on a parity with the Port of Galveston, as to export, import and coastwise rates, would be continued, for only by such equalization of rates could the Port of New Orleans hope to receive revenues sufficient to amortize, without additional taxation, the cost of the great docks, wharves, warehouses, elevators, and other port facilities provided at a cost of over One Hundred Million ($100,000,000.00) Dollars, at the Port of New Orleans at public expense, for the use and benefit of the commerce of the

whole country. There is no evidence showing injury to the Texas ports growing out of the equalized rates from Texas points on the appellants' railroads to New Orleans. On the contrary, the Texas ports have grown and prospered under the long standing policy of the appellants of placing the Port of New Orleans on a parity with Galveston and other Texas ports taking the same rates as Galveston. This is pointed out in the dissenting opinion of Commissioner Hall to report of June 27, 1929, referred to at length elsewhere in this brief, post.

Evidence of a substantial nature is essential to support an order under said Section 3. The Supreme Court states the rule tersely, as follows:

> "An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid." *Akron C. & Y. R. Co. v. United States (New England Division Case)*, 261 U. S. 184, 67 L. ed. 605.

"Differentials" stand before the law on the same footing as "rates." *They are certain specified amounts which shippers must pay over reasonable rates in order to purchase transportation.*

We do not find any authority in the Interstate Commerce Act for fixing "differentials" without evidence to support their reasonableness. In removing discriminations under Section 3, due consideration must be given to Section 1, for it is indisputable that the Commission is bound to make just and reasonable rates, and none other, in order to com-

ply with Section 1, when considering a case under Section 3. The same "dovetail" relation exists between Sections 1 and 3 as exists between Sections 13 and 15a, and the Supreme Court has pointed out that this dovetail relationship between different sections of the act must be given due considereation and that there must be evidence and findings under both sections to support an order removing unjust discrimination, under Section 3. *Wisconsin Case, Wisconsin v. C. B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed. 371, *Florida Log Rate Cases*, 282 U. S. 194.

The rule announced in the New England Divisions Case *supra* is settled law; but as an illustration of the severity with which the Supreme Court condemns arbitrary action by the Commission, we quote from *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 57 L. ed. 433, the following:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where right depended upon facts the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

In the case now before the Court, we have an illustration of the arbitrary exercise of powers by the Commission, so injurious in its effect as to destroy foreign commerce moving to and from the Port of New Orleans over two lines of railroad whose lines do not serve directly any Texas competing port. The tonnage thus lost to these two appellant railroads and the revenues therefrom, is of sufficient volume to jeopardize their earnings to such an extent as to render it difficult to meet operating expenses and fixed charges out of the traffic that is left them. This is a matter of serious consequences to the State of Louisiana, itself one of the largest shippers of freight over the complainants' lines, for it is obvious that, with this great loss of tonnage and revenues, the burden of meeting the expenses will be thrown upon other traffic, both interstate and intrastate, and ultimately will result in increased freight rates on the remaining traffic in order to make ends meet. This result seems inevitable, unless the orders of the Commission complained of, which act as an official embargo against the Port of New Orleans, are enjoined and annulled.

Ports cannot be compared with cross-road stores, or cities, towns and villages which are distributed all over the country and can operate without injury on a strict application of a mileage scale of rates. Ports differ from these localities in that they exist only at a few points located on or accessible to deep water, and enormous investments

are made in order to provide for the handling of the great volume of export, import, and coastwise tonnage that passes through such ports.

Section 3 of the act was never intended to be applied so as to injure these ports. In fact in the case we have a reversal of the principle upon which section 3 is grounded.

Section 3 is directed at *injurious* discrimination only. All discrimination is not injurious. In this case there was no showing of injury to the Texas ports, and therefore the necessity for an order under section 3 (1) did not exist.

In the *Shreveport Case, (H. E. & W. T. R. Co. v. United States,* 234 U. S. 342, 58 L. ed. 1341), the Supreme Court points out that the discrimination which section 3 is designed to prevent is that which operates "to the injury of interstate commerce."

In *United States v. Illinois Central R. Co.,* 263 U. S. 515, 68 L. ed. 417, the Supreme Court says,

> "To bring a difference in rates within the prohibition of section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

In *Swift Lumber Co. Case, (United States, et al. v. Illinois Central R. Co.,* 263 U. S. 515, 68 L. ed. 417), Justice *Brandeis,* speaking for the court says,

> "But mere discrimination does not render a rate illegal under section 3. Only such rates as involve unjust discrimination are obnoxious to that section. Manufacturers R. Co. v. United States, 246 U. S. 457,481, 62 L. ed. 831, 844, 38 Sup. Ct. Rep. 383."

II.

SINCE THE TEXAS & PACIFIC IS AN INDEPENDENTLY OPERATED RAILROAD, AND THE COMMISSION HAS SO HELD, IT CANNOT BE FOUND GUILTY OF A VIOLATION OF SECTION 3 BECAUSE IT ADOPTS THE POLICY OF SERVING ITS ONLY PORT AT RATES WHICH ARE EQUAL TO THOSE APPLYING AT GALVESTON ON THIS PARTICULAR DESCRIPTION OF TRAFFIC.

The Texas & Pacific Railway Company is an independently operated carrier, does not reach Galveston or any other Texas port, and has no control over the rates to and from Galveston.

The Supreme Court, in the case of *Pullman's Palace Car Company v. Missouri Pacific Railroad Company*, 115 U. S. 587, 59 L. ed. 499, held that the ownership by the Missouri Pacific Company of a majority of the capital stock of the Pullman Company, did not constitute the railroad company and the Pullman Company one and the same carrier.

In *Chicago, M. & St. Paul Ry. Co. v. Minneapolis C. Association*, 247 U. S. 490, 62 L. ed. 1229, the Supreme Court sustained an order of the Railroad Warehouse Commission

of Minnesota by which the Chicago, Milwaukee & St. Paul Railway Company, and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company were required to treat the tracks of the Minneapolis & Eastern, a subsidiary terminal company, as part of their terminal system. The Minneapolis & Eastern was a separate corporation whose stock was owned by the Chicago, Milwaukee & St. Paul Railroad Company and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company.

Separate charges had been established by the Minneapolis & Eastern and the carriers relied upon the *Pullman's Case, supra,* as justification therefor. The Court distinguished the two cases, by pointing out in its decision that the control of the Minneapolis & Eastern by the Chicago, Milwaukee & St. Paul, and the Chicago, St. Paul, Minneapolis & Omaha railroads was not for the purpose of "participating in the affairs of a corporation in the normal and usual manner, but for the purpose as in this case, of controlling a subsidiary company so that it may be used as a mere agency or instrumentality of the owning company or companies." The Court then concludes that:

> "In such a case the courts will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions, will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

In *Interstate Commerce Commission v. Stickney*, 215 U. S. 98, 54 L. ed. 112, the Supreme Court annulled an order of the Commission holding a separate terminal charge on through shipments by the railroad of the Union Stock Yards Company of Chicago. The Court said:

> "The Union Stock Yards Company is an independent corporation, and the fact, if it be a fact, that most or even all of its stock is owned by the several railroad companies entering into Chicago, does not make its lines or property part of the lines of the separate railroad companies."

The rule thus announced by the Supreme Court that mere ownership of the stock of one railroad company by another does not make the two companies one and the same, has been followed by the Interstate Commerce Commission in numerous cases, sufficient in number to make the interpretations by the Commission of the acts under which it functions, the declaration of law.

In the *Chicago, M. & St. P. Case, supra*, the court points out that ownership alone of one corporation by another does not create identity of corporate interest or create the relation of principal and agent between them. It is only when the ownership of capital stock of one corporation by another is resorted to for the purpose of making it the mere agent or instrumentality of the other company, that the courts look through the forms to realities of the relation between the companies as if the corporate agency did not exist, and will deal with them as justice may require.

In *West v. United States*, 258 Fed. 418, the court followed the decision in the *Pullman's Case, supra*, holding that mere fact of large ownership of stock in another company does not necessarily make the latter corporation a subsidiary of the former, nor does such fact amount to the assertion that the latter is dominated by the former corporation.

The Commission, in *Hughes Creek Coal Co. v. Kanawha & Michigan Railway Company*, 29 I. C. C. 671, refused to make a finding of unjust discrimination. The complaint alleged that the Chesapeake & Ohio possessed ownership and control of the Kanawha & Michigan Railway, and that for all practical purposes, the two railroads were one and the same, and therefore it was unjustly discriminatory for them to deny mines located on the Kanawha & Michigan access to markets which were available to the Chesapeake & Ohio mines. The ownership and control complained of was based upon stock ownership by the Chesapeake & Ohio in the Kanawha & Michigan and while the Commission did prescribe through rates under section 1 of the Act, as stated, it *refused to find unjust discrimination.*

The Commission, in prescribing mileage scales, frequently fixes a higher basis for joint line than for single line hauls, and requires that the single line scales be applied over routes consisting of two or more railroads under the same management or control; but in defining what is meant by the term "the same management or control," the Commission has said:

> "It should be understood that where the term 'carriers under the same management and control' is used in this report, it refers to carriers generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained."

The same ruling was made by the Commission in the case of *Atchison, Topeka & N. R. Co. v. Southern Railway Company*, 148 I. C. C. 708, in which numerous cases are cited to the same effect.

The above cases are cited in order to point out the law as interpreted by the courts and the Commission on the question whether stock ownership of one railroad company, in this instance, the Texas & Pacific Railway Company, by another, the Missouri Pacific, identifies the two corporations to such an extent as to make them one line of railroad. The controlling factor is the control "through ownership, lease, or otherwise to the extent of controlling traffic policy."

For some thirty years or more, the policy of the Texas & Pacific has been to equalize rates to the only port served by its line, with Galveston—not served by its lines—on coastwise, export and import traffic. When, in recent years, the Missouri Pacific acquired the Texas & Pacific by ownership of stock, this policy was not changed.

This policy operated to the best interests of the States of Louisiana and Texas and all of the other states which de-

pend on the ports of New Orleans and of Galveston and other Texas ports as outlets for their trade and commerce.

The policy of equalizing the ports of New Orleans and Galveston was sound. It was in the best interests of the stockholders of the Texas & Pacific, who are entitled to have their company receive its share of the coastwise, export and import traffic, under a policy that had been grounded in equity and just dealing with the public, and no competing carrier had ever brought a complaint against the Texas & Pacific to have the port equalization policy changed.

Keeping these two great, highly competitive gulf coast ports on a rate parity was in the best interest of the shippers, who should not be coerced by an unfavorable rate adjustment to eliminate from consideration the Port of New Orleans, and send or receive all of their coastwise and foreign traffic through the Port of Galveston, on account of a difference in mileage to the two ports from common points of origin or destination, whereas here, lines serving New Orleans do not reach Galveston.

The ports themselves could not and did not suffer from such a policy, for with equal rates to and from the ports, each could draw its fair share of the coastwise, export and import traffic from the west.

The policy of the complainants in keeping the rates to and from New Orleans equalized with rates to and from Galveston, from points located on their respective lines was not a violation of said Section 3.

The government, the Commission, and the Texas ports will say that "public policy" is not an element of rate-making to be considered by the Commission. Our reply is that public policy, where it is not injurious, but helpful to the public welfare, is as much a factor in rate-making as "competition" between ports. Congress, in the *Hoch-Smith Resolution*, (Joint Resolution of January 30, 1925, U. S. Code, title 49, sec. 55), recognized the necessity of a free movement of commodities. The first paragraph of the resolution provides,

> "That it is hereby declared to be the true policy in rate-making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move."

There can be no free movement of traffic to the Port of New Orleans under the contested order of the Commission.

III.

BEFORE A CARRIER CAN BE DEEMED GUILTY OF A VIOLATION OF SECTION 3, IT MUST BE SHOWN BY CONVINCING PROOF THAT THE PARTICULAR CARRIER IS RESPONSIBLE FOR BOTH THE ADJUSTMENT WHICH CREATES THE ALLEGED UNDUE PREFERENCE AND THE UNDUE PREJUDICE. WHERE A CARRIER IS NOT RESPONSIBLE

FOR THE ACT WHICH CAUSES THE UNDUE PREFERENCE OR PREJUDICE, IT CANNOT BE HELD RESPONSIBLE FOR AN ALLEGED VIOLATION OF SECTION 3.

It has already been held by the Commission in interpreting Section 3 of the Act, that carriers individually must be responsible for an alleged violation. This principle has become so grounded in the decisions of the Commission, that, until now, no one has questioned that it had become the fixed doctrine in respect to Section 3.

In the early history of the Commission, in the case of *Chicago Lumber & Coal Company v. T. S. R. Ry. Co.*, 16 I. C. C. 323, the Commission held that:

> "The law does not deal in these matters (discrimination) with all carriers collectively as a single unit or system, but its commands are limited to each, with respect to the service which it is required to perform."

In its first report, *Crews v. The Richmond & Danville Railroad Company*, 1 I. C. C. 401, the Commission said:

> "Railroad controversies and questions of rates * * * cannot be adjusted as they might be if all roads belonged to one system and were under a single control."

Section 3 has also been interpreted by the Courts as applying to individual carriers, and not to carrier groups composed of numerous separate entities. In *Penn Refining Com-*

pany v. Western New York & Penn Railroad Company, 208 U. S. 208, 52 L. ed. 456, the Court set aside an order of the Commission under Section 3 as to the Lehigh Valley Railroad, holding that the carrier could not be held liable for certain alleged preferences and prejudices by failing to give shippers on its line certain privileges granted to shippers by its connecting lines.

In *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83, the Court modified an order of the Commission which found the Union Pacific Railroad Company guilty of a violation of Section 3 as to allowances paid to grain elevators, and announced the often quoted principle that "The law does attempt to equalize fortune, opportunities or abilities." In *Peary & Company v. Union Pacific Railroad Company*, 176 Fed. 409, the lower court rejected the contention that a difference in the allowances so paid constituted a violation of section 3, on the ground that the rails of the Union Pacific did not reach St. Louis, and stated that this fact, "extracted from the difference every element of unjust discrimination or undue prejudice." The Supreme Court affirmed the lower Court, and on this point said:

> "As remarked below, the Union Pacific could not be complained of on this ground."

In dealing with an order of the Commission under Section 3 requiring the carriers to maintain no higher rates to Chattanooga than to Nashville, Tenn., the Supreme

Court, in *East Tennessee, Virginia & Georgia Railroad Company v. Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 725, setting aside the order, said:

> "The prohibition of the 3rd section, when that section is considered in its proper relation, is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers."

In *American Express Company v. South Dakota*, 244 U. S. 617, 61 L. ed. 1352, 1357, the Court says:

> "In its specific direction the order merely prohibits charging higher rates to and from Sioux City than to and from the five South Dakota cities. It could be complied with, (a) by reducing the interstate rates to the South Dakota scale, or (b) by raising the South Dakota rates to the interstate scale, or (c) by reducing one or raising the other until equality is reached in an intermediate scale."

A Section 3 order of the Commission was set aside by the Supreme Court in *Central Railroad of New Jersey v. United States*, 257 U. S. 247, 66 L. ed. 217, on the ground that the carriers did not have the alternative of establishing creosoting privileges at points claiming to be prejudiced or of withdrawing them at points alleged to be preferred. In very direct language, the Court lays down the rule, as follows:

> "What Congress sought to prevent by that section as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act 1920, February 28, 1920, Chap. 91, 41 Stat. L. 456, nor any earlier amendatory legislation has changed in this respect, the purpose or scope of section 3."

Neither the Texas & Pacific nor the Louisiana & Arkansas has any control over the joint through rates to Galveston. These joint rates are the result of agreement among the participating carriers, or of orders of the Commission. The complaining carriers only participate in these rates. It could not, if it desired, reduce rates to Galveston. There is no proof in the record before the Commission that the Texas & Pacific or the Louisiana & Arkansas has any control over the rates to Texas ports. There is specific evidence in the record showing that the Santa Fe lines and the Missouri, Kansas & Texas Railway would under no circumstances join the Texas & Pacific or the Louisiana Railway & Navigation Company lines in reducing rates to Galveston in order to secure differentials for that port.

The Commission made no finding under Section 1 of the Act, requiring that all rates must be just and reasonable. Without such a finding an order under Section 3 is only legal and valid when the carrier against whom it is directed has the option, as well as the power to exercise that option,

of removing the discrimination by increasing one rate or decreasing the other.

The Commission has held that to be the true meaning of section 3.

> *Ashland Fire Brick Co. v. Southern Ry. Co.*, 22 I. C. C., 155.

In *Richmond Chamber of Commerce v. Seaboard Air Line*, 44 I. C. C., 455, 463, the Commission said:

> "We have expressly said that there can be no undue prejudice within Section 3, unless it is within the power of the carrier charged with the discrimination to do away with it by its own act."

In *Farley Loetscher Mfg. Co. v. Director General*, 73 I. C. C. 70, the Commission said:

> "In Ashland Fire Brick Co. v. Southern Railway Co., 22 I. C. C. 115, we found that a carrier is not guilty of undue prejudice * * * unless it is able to remove the prejudice by alternative methods. Those tests still obtain. They have been applied by us in numerous cases. They should be decisive here."

The Supreme Court, in *Central Railroad of New Jersey v. United States, supra*, reversed the District Court for the Eastern District of New Jersey, which refused to enjoin the enforcement of an order of the Commission, on the ground that it was arbitrary. The order of the Commission disclosed that certain carriers "in so far as they participate

in carrying joint rates" on forest products through Newark, N. J., from points in southern classification territory to points in northern New Jersey, Eastern New York and New England, subjected the American Creosoting Company to undue prejudice, and the carriers were directed to avoid this prejudice. The manner of removing the discrimination was not prescribed. In effect, it directed that unless the New Jersey Central and the Pensylvania railroads established the privilege of creosoting in transit at Newark, the other carriers must withdraw from all tariffs establishing the joint rates.

After an elaborate statement of the facts found by the Commission, the Court says (257 U. S. 256):

> "But the question presented here is whether this discrimination found can be held attributable to the appellants, and whether they can be required to cancel existing joint rates unless it is removed. No finding made by the Commission can prevent the review of such questions."

In the *Boston Chamber of Commerce Case*, 95 I. C. C. 539, the Commission, dealing with a situation almost identical with the present one, said:

> "A more serious objection is the fact that the New York Central, which is the rate-making line from Buffalo to Boston, is not the rate-making line from Buffalo to either Philadelphia or Baltimore. It can not control the rates to those north Atlantic ports. Nor can the carriers which operate over the direct

> rate-making routes to Philadelphia or Baltimore control the rates from Buffalo to Boston. In such a situation, it is claimed, and we think correctly, that it is impossible to find that defendants, or any of them, unduly prefer Baltimore and Philadelphia over Boston to the undue prejudice of the latter."

In *Lake Cargo Coal Rates*, 101 I. C. C. 513; 126 I. C. C. 309, the Commission held that where the carriers controlling the rate adjustment from southern West Virginia and Kentucky district are not the same as those which control the adjustment from complaining districts, was grounds for dismissal of the complaint, and it was dismissed. The Commission in its last report (126 I. C. C. 340) says:

> "Under the circumstances of the present case we have for many years held that no undue prejudice or preference may be found, following *Ashland Fire Brick Co. v. Southern Railway Co.*, 22 I. C. C. 115. The doctrine of that case has been recognized and followed since the decision in *Swift Lumber Co. Case.* See *Lake Cargo Coal Cases*, 89 I. C. C. 170, 185."

This long continued practical construction of the Interstate Commerce Act, and especially Section 3, by the Commission in its administration of the law, fortified by judicial decisions, should be taken as fixing the meaning of the provisions of the said section. This rule is applied to legislative bodies, and recently the Supreme Court in *McGrain v. Dougherty*, 273 U. S. 135, 71 L. ed. 580, 593, held that the rule applied to Congress. The Court says:

> "So when their (Congress') practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been long continued, it falls nothing short of a practical construction, long construed, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful."

Certainly if such a rule applies to Congress, it applies to a Commission created by Congress.

The Supreme Court, in *United States v. Illinois Central Railroad Company*, 263 U. S. 515, 68 L. ed. 417, sustained an order of the Commission approving the lumber rate adjustment from the so-called blanket territory, which extends south from Jackson, Mississippi, to the Gulf of Mexico and from the Mississippi River to Alabama. The carriers had established the same through lumber rates to northern lumber markets from all of the blanket territory, regardless of distance. The spead of the territory from its north to its southern boundaries was about 200 miles. The Illinois Central connects with the Fernwood & Gulf Railroad, an independent short line, in the heart of the yellow pine lumber blanket. At Knoxo, 27 miles from the junction, a lumber mill was located. The rate from Knoxo on the tap line, was 2 cents higher than from the junction point and all other points in the blanket territory except from points on the independent tap lines. The fixed policy of the carriers was not to make rates from points on the tap lines

the same as those applying from the junction and allow competition with points on the individual lines or systems serving the yellow pine blanket. The Commission found that the rates from Knoxo were not unreasonable, but that they were discriminatory under Section 3 of the Act, and ordered the discrimination removed. The Court referring to the order (263 U. S. 520, 521) says:

> "The order leaves the carriers free to remove the discrimination either by making the Knoxo rates as low as that from Fernwood, or by raising the rate from Fernwood, or by giving both an intermediate rate."

The Court reviews the facts found by the Commission showing discrimination against Knoxo, in that the rates charged from that point are higher than from competing points, and says:

> "But mere discrimination does not render a rate illegal under Section 3. Only such rates as involve unjust discrimination are obnoxious to that section."

There is no stronger argument to be found in favor of equality of rates on highly competitive business from a wide territory, without regard to distance, than in the reasoning of the Court in the *Fernwood & Gulf Case, supra.*

In this case, the particular traffic involved was from and to points in the interior. But the same rates from a large blanket territory to numerous destinations, the distances

varying over 200 miles, was found by the Commission not to be in violation of section 3.

The orders now in controversy are violative of both the spirit and the letter of undue preference or prejudice condemned by section 3 and should not be upheld.

IV.

TO BRING A VIOLATION OF SECTION 3 UNDER THE CONTROL OF THE COMMISSION, THE PREJUDICE OR PREFERENCE MUST BE UNDUE, AND IS NOT ILLEGAL UNLESS SHOWN BY THE EVIDENCE THAT IT IS NOT JUSTIFIED BY THE COST OF THE RESPECTIVE SERVICES, BY THEIR VALUES OR BY OTHER TRANSPORTATION CONDITIONS.

The Court in the *Fernwood & Gulf Case, supra,* announces a definite formula to be applied by the Commission in proceedings involving violations of Section 3 and in no uncertain terms, it declares that:

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions."

With this plain rule laid down by the Supreme Court, the Commission decided the case now in controversy, and rendered its obnoxious orders without a solitary word of

evidence, or a single fact, showing the cost or values of the respective services rendered by the carriers serving Galveston and by the Texas & Pacific and other carriers serving New Orleans.

In the absence of such necessary proof, the Commission was without authority to make a finding as to unjust discrimination under section 3, and its order is invalid for want of that full hearing which is required, and that proof which is essential, before a carrier can be found guilty of undue preference or prejudice under Section 3, and condemned to pay the extreme penalty of giving up its foreign and coastwise traffic at the Port of New Orleans because of the differentials established on New Orleans traffic over Galveston traffic which penalize shippers of such traffic to such an extent as to cause them, in their own self-interest, to abandon the use of the Port of New Orleans, and use exclusively the Port of Galveston, although the Texas & Pacific Railway Company does not serve Galveston, and has always adopted and followed the rate policy and practice of keeping the Port of New Orleans on rate parity with the Port of Galveston.

V.

THE COMMISSION IS NOT AUTHORIZED TO PRESCRIBE DIFFERENTIALS UNLESS THEY ARE BASED UPON A FINDING UNDER SECTION 1 OF THE INTERSTATE COMMERCE ACT, THAT THE

RATES THEMSELVES ARE JUST AND REASONABLE, OR UNLESS PREDICATED UPON A FINDING AS TO JUST AND REASONABLE RATES.

Before this case was finally decided by the Commission, the complainants withdrew their complain. under Section 1, thus leaving only alleged Section 3 violations to be considered by the Commission.

Section 1, of course, requires that all rates shall be just and reasonable. Rates not just and reasonable are therefore in violation of the Act. But no investigation was made by the Commission to determine whether the rates to and from Galveston or to and from New Orleans were just and reasonable. The differentials themselves were fixed without an investigation as to whether they were or were not just and reasonable, as measured by any standards known to rate regulation.

The fixing of "differentials" *per se* is not authorized by any direct language of the Act, and if such authority is to be implied, the implication grows out of the duty on the part of the Commission to fix just and reasonable rates. The word "differential" is nowhere to be found in the Interstate Commerce Act. When, therefore, rates to the Port of New Orleans on foreign and coastwise traffic are cancelled by virtue of differentials prescribed without evidence to show that the rates to and from New Orleans are unjust and unreasonable, the differentials become mere arbitrary charges, unsupported by proof and unauthorized by law.

In support of its supposed authority to remove, under section 3, the alleged undue prejudice to Galveston and other Texas ports and undue preference of the Port of New Orleans, by prescribing differentials over the rates applicable to and from Galveston on the same commodities to or from New Orleans where the short-line distances to New Orleans exceed those to Galveston by more than approximately 25 per cent, (R., 3438, 3454), the Commission relies upon the *Shreveport Case (H. E. & W. T. Ry. Co. v. United States)* 234 U. S. 342, 356, 58 L. ed. 1341; *St. Louis S. W. Ry. Co. v. United States,* 245 U. S. 136, 62 L. ed. 199; *Central R. R. Co. of N. J. v. United States,* 257 U. S. 247, 66 L. ed. 217; *Chicago, I. & L. Ry. Co. v. United States,* 270 U. S. 287, 70 L. ed. 590; and *United States v. I. C. R. R. Co.,* 263 U. S. 515, 68 L. ed. 417.

The Shreveport Case, supra, involved a violation of both sections 1 and 3 of the Act to Regulate Commerce. The Commission in its report of December 23, 1929, says:

> "In *Houston and Texas Ry. Co. v. United States,* 234 U. S. 342, 356, the court said that the language of section 3 (1) quoted 'is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn.' * * * It is apparent from the legislative history of the act that the evil of discrimination was the principal thing aimed at."

In the *Shreveport Case* the Supreme Court considered an order of the Commission in which reasonable interstate

rates had been prescribed by the Commission upon a full and complete hearing, as required by the act, and then, in order to remove the discrimination against interstate commerce, required the intrastate rates of Texas to be raised to the level of the interstate rates prescribed. The court had before it no such case as is now presented. Not only did the carriers themselves present voluminous evidence on the question of the unreasonableness of the intrastate rates and the reasonableness of the interstate rates, but showed that the continued application of the rates within eastern Texas on a lower basis than the interstate rates found reasonable by the Commission gave an unlawful and undue preference and advantage to the Texas points, and was an unlawful and undue prejudice to Shreveport. (*Shreveport Chamber of Commerce v. H. E. & W. T. R. Co.*, 23 I. C. C. 31, 46-48). In the present case the question of the reasonableness of the rates to New Orleans and to Galveston has been completely ignored.

The case of *St. Louis Southwestern Ry. Co. v. United States, supra*, did not involve an interpretation of section 3 of the Act to Regulate Commerce as it existed prior to the Transportation Act, 1920. In that case the plaintiffs sought to set aside an order of the Commission of January 21, 1916, directing the appellant and other carriers to establish through routes and joint rates on logs and lumber to Paducah, Kentucky, and to reduce existing rates. The power of the Commission to establish through routes and

joint rates is set forth in section 12 of the act. There were no changes made in the first paragraph of section 3 of the Interstate Commerce Act, as amended by the Transportation Act, 1920. The Commission found the rate attacked unreasonably high and reduced it by establishing joint through rates. In closing the opinion the court says:

> "But, the order is strictly one under Section 15 of the Act to Regulate Commerce, to reduce existing through rates by establishing joint rates, or, in the alternative, to establish new through routes with joint rates. It is not primarily an order to remove discrimination in violation of section 3."

We do not see, therefore, that this case has any application to the case at bar.

In *Central R. R. Co. of New Jersey v. United States*, *supra*, the Supreme Court reviewed an order of the Commission, declaring that the 23 carriers "insofar as they participate in tariffs carrying joint rates" on forest products from points in southern classification territory to points in northern New Jersey, eastern New York, and New England, subject the American Creosoting Company to undue prejudice and disadvantage; and it directs these 23 carriers to avoid this undue prejudice. The court points out that the Commission had the power under section 1 of the Act to Regulate Commerce, as amended, to determine whether, in the particular case, a transit privilege should be granted or withdrawn; that the Commission did not exercise its

powers under section 1 to direct the Central R. R. Co. to establish the creosoting in transit practice at Newark, if it deemed failure to do so unreasonable or unjust, and says that it did neither. "Instead, it sought to accomplish by indirection either one result or the other, and ordered, under section 3, that the discrimination found to exist be removed." Commenting upon the failure of the carriers to establish the creosoting privilege at Newark, the court says,

> "But to do so would involve departure from a policy to which they have steadfastly adhered, and adhesion to which was held by the Commission not to be unreasonable. If they should establish the privilege a Newark, they would act contrary to their judgment, and would adopt a practice which some connecting carriers has introduced without their concurrence or consent, and which may hereafter, upon appropriate inquiry, be held by the Commission to be unjust and unreasonable. Congress could not have intended that, under such circumstances, relief should be afforded under section 3, when a direct remedy is available under section 1."

It is therefore apparent that the court in this case did not intimate that in removing undue preference or prejudice under section 3 there should not be a finding by the Commission that either the rates that gave the preference was unreasonably low or the rate that created the prejudice was unreasonably high.

In *Chicago, I. & L. Ry. Co. v. United States, supra*, the Supreme Court reviewed an order of the Commission di-

recting the Chicago, I. & L. Ry. Co. and other carriers to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate car load traffic and to make arrangements with it for reciprocal switching. (88 I. C. C. 525.) While it is true the court in the above case held that "Wherever discrimination is, in fact, practiced, an order to remove it may issue and the order may extend to every carrier who participates in inflicting the injury," the order under review left the railroads free to remove the discrimination by any appropriate action.

In the case of *United States v. Illinois Central R. R. Co., supra*, the Supreme Court reviewed orders of the Interstate Commerce Commission in which were attacked the rates from Knoxo, Miss., on the Fernwood & Gulf Railroad, to northern points by the Illinois Central and connecting carriers higher than the rates from the points in the socalled blanket territory, extending from Jackson, Mississippi, into Alabama. The rates were attacked as unreasonable under section 1 of the Act to regulate commerce, and as unjustly discriminatory under section 3. The Commission made a finding under section 1 that the rates from Knoxo were not unreasonable, but that such rates did subject the Swift Lumber Co., which brought the complaint, to undue prejudice, but in that case the court says:

> "To bring a difference in rates within the prohibition of sec. 3, it must be shown that the discrimination practiced is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions. But the mere fact that the Knoxo rate is inherently reasonable, and that the rate from competing points is not shown to be unreasonably low, does not establish that the discrimination is just. Both rates may lie within the zone of reasonableness and yet result in undue prejudice. American Exp. Co. v. Caldwell, supra."

The proof offered before the Commission by the complainant carriers in this case, and filed in court, shows that the rates to and from New Orleans are just and reasonable. The carriers so emphatically stated, and no one attempted to contradict such proof. The Commission's reports and orders do not condemn the said rates as unjust and unreasonable. The "differentials" arbitrarily fixed, and ranging from 9 cents per hundred pounds to 2 cents per hundred pounds on the various commodities involved, are just these amounts more than the proof shows to be reasonable rates to and from the Port of New Orleans on shipside traffic.

VI.

THE ORDERS OF THE COMMISSION COMPLAINED OF, FOR THE REASONS STATED, GIVE A PREFERENCE TO THE PORTS OF THE STATE OF TEXAS

OVER THOSE OF THE STATE OF LOUISIANA, AND ARE, THEREFORE, IN CONFLICT WITH ARTICLE I, SECTION 9, CLAUSE 5 OF THE CONSTITUTION OF THE UNITED STATES.

It has been shown that the orders of the Commission fixing differentials in rates to Galveston under rates to New Orleans, where the distances from or to New Orleans exceed the distances to or from Galveston from common points of origin and destination in states west of the Mississippi River, on coastwise and foreign traffic, were not based upon any evidence showing that the equalization of rates to the said port caused any injurious discrimination against Galveston, or any undue prejudice to Galveston, or undue preference to New Orleans.

Section 3 of the Interstate Commerce Act has not been violated by the complainants, which do not control the making of rates to Galveston and do make the rates to New Orleans uncontrolled by any other carriers.

The differentials fixed by the Commission effectively stop the traffic to and from New Orleans on coastwise export and import traffic from and to points on the Texas & Pacific.

The orders complained of have already caused to be cancelled the equlized through routes, rates and divisions carried by the Texas & Pacific in connection with carriers serving the territory covered by said orders and thus the Port of New Orleans has been deprived of all joint line

coastwise, export and import traffic, formerly moving over the complainant's lines. This traffic is substantial, amounting, according to the Texas & Pacific's estimate, to a loss to it of some $300,000 annually in freight revenues, and a loss to the Port of New Orleans of some 5761 tons of foreign and coastwise traffic moving through the Port of New Orleans to and from points on the Texas & Pacific Railway. This tonnage, lost to New Orleans, under the Commission's preferential treatment of Galveston, will be forced to move through Galveston and thus a direct preference is given by a regulation of commerce to the ports of one state over those of another.

The *Constitution, Article I, Section 9, Paragraph 5*, provides that:

> "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."

When an order, or orders, of the Commission gives a preference to the Port of Galveston by fixing differentials in favor of Galveston under New Orleans, and hereby prohibits the Texas & Pacific and Louisiana Railway & Navigation Company, New Orleans carriers, from serving New Orleans upon rates equal to those applying to and from Galveston, it violates the plain mandate of the Constitution. The Commission is not immune from these provisions, nor is Congress, and it will not be presume that Congress

intended that the Commission should so exercise its powers as to violate the clause prohibiting the giving of a preference to the ports of one State over those of another.

Any regulation of commerce which gives to the ports of one State a preference over those of another, is unconstitutional. When the Commission deprives the Port of New Orleans of rates which its carriers declare are just and reasonable, as they have done in this case, it deprives Louisiana's principal port of its just and equitable right to fair and non-preferential treatment by the carriers serving the port.

The Supreme Court in *Pennsylvania v. the Wheeling & Belmont Bridge Company*, 18 How. 435, 15, L. ed. 435, 438, referring to the said constitutional provision, says:

> "It may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular state over those of another."

In *Armour Packing Company v. United States*, 209 U. S. 56, 52 L. ed. 681, 694, the Court said: (speaking of the same provision)

> "This provision was intended to prevent legislation to give, or having the effect of giving, preference to the ports of one state over those of another state."

Thus, in the two leading cases dealing with this provision of the Constitution prohibiting the giving of pref-

erence by any regulation of commerce to the ports of one state over those of another, the Supreme Court has emphatically declared that the provision was intended to prevent legislation to give, *or having the effect of giving*, preference to the ports of one state over those of another. It must follow, with equal certainty that an order of a subordinate branch of the government, acting under powers delegated to it by an act or acts of Congress, *that gives, or has the effect of giving*, preference to the ports of one state over those of another, is an unconstitutional order and cannot be enforced.

This salutary provision was written into the organic law of the Nation to prevent the happening of the very thing which has happened in this case. The restriction does not apply to the several states, but restrains only the Federal Government from so using its powers as to give a preference to the ports of one state over those of another.

M. L. & T. R. R. & S. S. Co. v. Louisiana, 118 U. S. 455, 30 L. Ed. 237, 242.
Munn v. Illinois, 94 U. S. 238, 24 L. Ed. 77.

It seems too plain to require argument that the orders of the Commission closing the Port of New Orleans to foreign and coastwise traffic to and from local points on the Texas & Pacific and Louisiana & Arkansas Railways, and requiring, by the use of controlling differences in freight rates, shippers to use the Port of Galveston,

because of a difference in distance, is a real preference of so substantial a nature as to shock the conscience of the court.

These orders, too, are made in the face of undisputed proof that the equalized rates of the complainants to and from New Orleans are profitable, and that they desire to continue their policy that has been in effect for more than thirty years, of keeping the Port of New Orleans, as to foreign and coastwise traffic, on a rate parity with the Port of Galveston, its most formidable competitor on the Gulf Coast.

For the reasons stated, the orders complained of violate Article I, section 9, paragraph 5, of the Constitution and are void.

VII.

RATE ADJUSTMENTS WHICH PREVENT THE MOVEMENT OF TRAFFIC FREELY OVER A DIRECT ROUTE TO A PORT OF IMPORTANCE, IS NOT IN ACCORD WITH THE DICTATES OF CONGRESS.

While the State of Louisiana is merely an intervenor in this case, it is obvious that the interests of the State in securing fair treatment for the Port of New Orleans is real and substantial and that both the State and the Port have substantial interests in having the coastwise and foreign traffic move freely over the Texas & Pacific Railway, as well as over the Louisiana Railway & Navigation Company's lines, to and from New Orleans.

The Joint Resolution of Congress of January 30, 1925, known as the *Hoch-Smith Resolution* (43 Stat. L. 801, U. S. Code title 40, sec. 55), was an expression by Congress as to the rate making policy to be followed by the Interstate Commerce Commission.

While the immediate cause for the adoption of the Hoch-Smith Resolution was the desire on the part of Congress to give some assistance to agriculture, which was suffering from excessive transportation burdens, the resolution went much further and declared a policy as a guide to the Commission in carrying out the wishes of Congress in fixing all rates.

The first paragraph of the said resolution provides:

> "That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any time prevail in our several industries should be considered in so far as it is legally possible to do so, *to the end that commodities may freely move.*" (Our italics).

On account of the large exportation of grain, cotton factory products, cotton seed and peanut cake and meal, cotton seed and peanut oil, packing house and other related commodities, and other products of argiculture upon which differentials in favor of Galveston are prescribed by the Commission in the orders under attack, the Hoch-Smith Resolution has a direct bearing upon the rate adjustment

now under consideration, applicable to the movement of such traffic to and from New Orleans and Galveston.

Not only the spirit, but also the letter of this law is violated by the orders of the Commission. There can be no movement of the traffic in question to the Port of New Orleans under the differential policy of rate making followed by the Commission in their orders. Rates giving to Galveston a great advantage over New Orleans, are not adjusted "to the end that commodities may freely move." In announcing this salient policy of rate making, Congress certainly did not have in mind the favoring of any particular port over a competing port. The law was to help agriculture, to encourage a greater movement of commerce, and to afford shippers the opportunity of using the transportation lines without restriction as to markets, which includes foreign as well as domestic markets, and ports as well as interior points.

In the third paragraph of the said resolution, Congress again emphasizes its charge to the Commission by directing that:

> "In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least possible delay such lawful changes in the rate structure of the country *as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression*, including live stock, *at the lowest possible lawful rates compatible with the maintenance of adequate transportation service.*" (Our italics).

When the complaining carriers decide upon the policy of keeping the Port of New Orleans on an equality as to rates on coastwise and foreign traffic, with the Port of Galveston, they violate no provision of the Interstate Commerce Act or its amendments, but carry out both the spirit and purpose of the Hoch-Smith Resolution, by giving to the agricultural products of the West the use of the ports of two States instead of those of one.

The dissenting opinion of five commissioners and one of the judges correctly state the law of the case, and are entitled to great weight.

The orders of the Commission under review and especially the order of December 23, 1929, by which the appellant railroads are required to remove the alleged undue prejudice to Galveston and undue preference of New Orleans by establishing the same rates to or from New Orleans or Galveston, as the case may be, in instances where the difference in distance from an[illegible] to the ports are not greater than 100 miles is of such grave concern to the future welfare of the country and the preservance of the Port of New Orleans as to require that the court should go behind the merely formal conclusions of the Commission that the long established policy of the railroads in equalizing the Port of New Orleans with the ports of Texas is unduly prejudicial to the Port of Galveston and unduly preferential of the Port of New Orleans, and ascertain exactly what the Commission has done and upon the ap-

plication of what principles it has reached its conclusions. This rule was followed by the court in *Anchor Coal Co. v. United States*, 25 Fed. (2d) 462, based upon the authority of *Southern Pacific Railroad Co. v. Interstate Commerce Commission*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. ed. 283; and *United States, v. New York Central R. Co.*, 263 U. S. 603, 44 Sup. Ct. 212, 68 L. ed. 470. This requires that the court should analyze not only the report of the Commission accompanying the order whose enforcement is now sought to be enjoined, but also the previous reports made in 1927, (R., 76, R., 3367), and in 1925, (R., 70, R., 3346). The fact that the equalization of the Texas ports with the port of New Orleans is of long standing and has not been shown to injure the Texas ports is of the greatest importance in this case, and yet, the Commission has disregarded the policy of the railroads in preserving the import, export, and coastwise traffic of the two ports, and has deprived the management of these railroads of their rights to operate their properties to their best advantage and to the greatest benefit of the ports, and the shippers who desire to use these ports.

Much consideration was given by the Commission to the relative competitive conditions at the ports of New Orleans and Galveston in its reports of December 23, 1929, and June 29, 1927, and it appears that the competitive conditions at the ports were of controlling importance in

reaching the conclusions contained in the last report of December 23, 1929, where the previous finding, that the Texas & Pacific Railway and the Louisiana Railway & Navigation Company should be excepted from the order requiring a differential in rates from points on their respective lines to New Orleans over the rates to Galveston, was reversed. While competitive conditions may be taken into consideration, along with other facts and circumstances of the record, they do not furnish sufficient grounds for a finding under Section 3 that reasonable rates from points on the appellants' lines to New Orleans unduly prefer the Port of New Orleans and unduly prejudice the Port of Galveston and the other ports of Texas, taking the same rates as Galveston.

Shippers are to be considered in an adjustment of such wide extent and for reaching consequences as the Commission has ordered in this case.

In one of the earliest cases involving the powers of the Commission under Section 3 of the Act to Regulate Commerce, which is the same as Section 3, (1), of the Interstate Commerce Act, as amended by the Transportation Act, 1920, the Supreme Court, through *Justice Shiras*, laid great stress upon the consideration which should be given to interior shippers and localities in determining questions of discrimination under Section 3.

Texas & Pacific Ry. Co. v. Interstate Commerce Commission, post.

In *Anchor Coal Co. v. United States, supra,* the district court pointed out that,

> "The interest of the public or of the consumers of coal who will benefit by the reductions in rates offered by the carriers ought not to be lost sight of. As said in Galloway Coal Co. v. A. G. S. R. R. Co., 40 I. C. C. 311, consumers should be given the widest possible markets consistent with justice to the carriers, and the carriers, as a matter of traffic policy, may accord competing producing centers located at different distances from common centers of production identical rates." 25 F. (2d) 462.

In the *Anchor Coal Co. case, supra,* the court enjoined the order complained of on the ground that the Commission had exceeded its powers and proceeded upon erroneous theories of law, saying,

> "We think that its action was essentially an effort to equalize industrial conditions or to offset economic advantages by rate adjustments not warranted by anything in the Transportation Act, 1920, or the Hoch-Smith Resolution. * * * The effect of the injunction will be, as we have already said, to restore the differential which the Commission itself established and which it approved before it reached the conclusion that it was its duty to consider the industrial conditions prevailing in the northern field and the shift of traffic resulting therefrom. It will result in a reduction of rates which the carriers are willing to make, and which will enable the public to obtain the benefit of lower cost of transportation. It cannot injure the carriers which

> serve the competing northern field, because the maximum rate which they can charge is lower than the reduced rates from the southern field. In a word, its only effect will be to prevent the Commission from interfering with industrial conditions in the localities affected and from forbidding a reduction of rates which will preserve the differential that has prevailed for many years."

These expressions of the courts, in connection with the dissenting opinions of several of the commissioners and of one of the three judges who heard the case, are entitled to weighty consideration, because they closely follow the well reasoned opinions of the Supreme Court and of the district court to which we have referred, and the unanswerable reasoning of the commissioners, referred to in the following paragraphs.

The report of the Commission in No. 12798, *Galveston Commercial Association vs. G. & S. A. Ry. Co., et al.,* (R., 3367), was concurred in in full by Commissioner Campbell, its author, and Commissioners Meyer, Eastman, and Lewis. Commissioners McManamy and Taylor concurred only in part. Commissioners Hall and Woodlock dissented to the entire report, and Commissioner Brainerd did not participate in the disposition of the case. The dissenting opinions are important because they review the facts, as developed in the record before the Commission, and Commissioner Hall points out the lack of basic allegations supported by proof which are necessary to justify the Com-

mission in establishing differentials which debar the port of New Orleans from participating in import, export, and coastwise traffic from points on the Texas & Pacific Railway and the Louisiana & Arkansas Railway, which are nearer to Galveston than to New Orleans.

Commissioner *McManamy* concurs in the conclusions generally, but states that, "No sufficient reason is shown for the different treatment applied to those commodities," viz, petroleum and its products, (R., 3428).

Commissioner *Taylor* concurs in part, and dissents in part, on the following grounds,

> "I dissent, in part, from the opinion of the majority in No. 12798, because the act, Section 1, requires that all charges made for the transportation of propetrty shall be just and reasonable, and prohibits and declares unlawful every unjust and unreasonable charge for such service. I do not believe that any rate or rate adjustment can be just and reasonable that deprives any port or other locality of its just and reasonable advantages of geographical position, and I do not believe that this mandate of the law has been properly observed in the opinion of the majority in this case. Certainly, after having established a differential in favor of the port of Galveston with respect to the movement of grain, on account of its just and reasonable advantages of geographical position, it is utterly inconsistent to destroy the same advantages in regard to the movement of petroleum and its products, where the just and reasonable advantages of geographical position are the same as in the movement of grain." (R., 3428, 3429).

Commissioner *Hall*, dissenting to the entire report, says,

> "In deciding this strife between Texas ports and Louisiana ports, confined as it is to import, export, and coastwise rates, the producers and shippers who pay those rates seem to have been lost from sight. No one is here urging that the rates to Galveston are unreasonably high or to New Orleans unreasonably low. There is no allegation of unreasonableness. But carriers which are able and willing to afford neighboring shippers the benefit of a choice of ports at equal rail rates, all between between the upper and nether bounds of reasonableness, are debarred from doing so by findings of undue prejudice to the ports. How about undue prejudice to the shippers?
>
> The ports are but outlets, way stations on the longer journey to or from foreign lands on our own distant coasts. A line is here drawn across the map. From one side of that line a man may ship at the same rate through Galveston or New Orleans, according as vessels offer or his choice inclines. From the other side of that line an obstacle of our devising will bar the route through one port and leave him no choice except at a prohibitive differential in rate. His distance from New Orleans may be no greater than that of his competitor, who has a choice between two ports at the same rate, but if he selects New Orleans he must pay the higher rate. It needs no argument to show that such treatment of two shippers on the same rails equidistant from New Orleans, or from Galveston, as the case may be, may result in undue prejudice to one and undue preference of the other,

because of that difference in relative treatment, even though all the rates are within the bounds of reasonableness.

Galveston and New Orleans do not pay the rates. Their export or import houses, their brokers or factors, their bankers, their warehousemen and stevedores, may render helpful service in the exporting or importing of goods, but that does not give them a right to demand that traffic he made to flow through one or the other of those ports for their benefit and gain, and that carriers be debarred from acording equal facilities at equal rates to those who ship and pay the freight.

The Texas ports allege, and the majority agree, that they have been hurt in this process of equalization. They do not desire to continue on a rate parity with New Orleans and thus to compete for the business strictly on a service basis. They desire a positive rate advantage so that, other things being equal, there will no longer be competition between the ports and the tonnage will be forced through the Texas ports. Is it part of the duty of rail carriers to accord such advantage?

The Texas ports, considered as a whole, show a gain of 334 per cent in total tonnage, 1924 over 1912. Houston alone, shows a gain of 391 per cent for that period, whereas New Orleans has gained 225 per cent. Although Galveston's gain was only 191 per cent it is manifest that its failure to keep pace with New Orleans in percentage of gain was due to the rapid growth of traffic through other Texas ports, and not to inroads by New Orleans.

The majority report shows that grain, cotton, and the products thereof constitute the export tonnage most important to Galveston.

On grain the rates from Oklahoma are now from 1.5 to 10 cents lower to Galveston than to New Orleans, and from points in Kansas on the Santa Fe, one of the principal grain-carrying lines, its rates to Galveston are 5 cents under those to New Orleans. During the period 1915 to 1925, inclusive, New Orleans exported 273,703,166 bushels of grain and Galveston 273,562,266 bushels. In 1914 Galveston exported 42 per cent of the cottonseed cake and meal moving through Gulf ports, as against 41 per cent for New Orleans. In 1924 the figures had changed to 35 and 11 respectively, and Houston led with a figure of 44 per cent.

In *Galveston Commercial Asso. v. A. & V. Ry. Co.*, 77 I. C. C. 388, 395, the complainants sought a differential of 10 cents, Texas ports under New Orleans, on cotton from Oklahoma. The Commission said, at page 397:

> 'While considered solely from the standpoint of the relative distances to the Texas ports and New Orleans, it would appear that the rates to New Orleans might properly be somewhat higher than to the Texas ports, the substantial equalization of the ports which has long obtained as to this traffic from Oklahoma is the result of the voluntary policy of the carriers and appears to be in the interest of producers and shippers generally. * * *. The interests of the carriers reaching Galveston are different from those of the carriers reaching New Orleans, and the latter carriers, notwithstanding the somewhat greater average distances shown to New Orleans, have chosen to maintain substantially the same rates as are maintained by the Galveston carriers to

> Galveston. The measure of the rates to New Orleans is not in issue, and the record affords no basis for requiring the carriers, under a finding of undue prejudice, to disrupt the present substantial equalization of the ports by increasing the present rates to New Orleans.'

The situation now before us is the same in essence. I fail to perceive how a carrier which serves one of these ports, but not the other, violates the law by maintaining to its port reasonable rates equal to the reasonable rates maintained by another carrier to the other port, or that any carrier, whether serving both ports or not, violates the law by meeting that carrier's competition and maintaining like reasonable rates to both ports. In the absence of a clear showing of substantial injury carriers should be left free to adjust their rates on a competitive basis so long as neither set of rates transgresses the limits of maximum or minimum reasonableness.

In the case before us there is no persuasive showing that the Texas ports have had a less healthy development of traffic than New Orleans, for example. Considered as a whole they have gained fær more than New Orleans both in percentage and in total tonnage. Galveston has gained less than Houston, but both make common cause against their Louisiana rival. In finding undue prejudice to the Texas ports we are unwittingly reversing the remedial purpose of the statute. The ports, like the railroads, are there to serve the shipper, not the shipper to serve the ports or the railoads. 'The Sabbath was made for man, and not man for the Sabbath'." (Our italics).

Commission *Woodlock*, dissenting to the whole report, says,

> *"I am unable to find in the record in these cases clear evidence that equalization of the New Orleans ports with the Texas ports has in fact resulted in undue prejudice to the latter and preference of the former, and, therefore, I can not find in the situation a violation of Section 3 of the act."* (Our italics).

In the report of December 23, 1929, Commissioner *Brainerd*, who took no part in the report of June 29, 1927, concurring, says,

> "I am of the opinion that there is a legal basis for including in our Section 3 order heretofore entered in this cause the Texas & Pacific and the Louisiana Railway & Navigation Company of Texas, and to the extent that it is proposed to include them in such order, I concur in the findings of the majority in their report on further hearing. *However, I am not prepared to say that the maintenance of a parity of rates from points in the territory here involved to New Orleans and to the Texas ports on import and export traffic, especially on grain, results in undue prejudice to the Texas ports and an undue advantage to New Orleans as a matter of fact, as found by the commission in its previous report herein, in the consideration of which I took no part. That question is an important issue in our investigation of the grain rate structure now pending before us for consideration."* (Our italics).

Commissioner *Meyer*, dissenting to the report of the majority, says,

> "The previous report, 128 I. C. C. 349, took the position that the Missouri Pacific did not control the traffic policy of the Texas & Pacific. With that finding I could not then agree, as indicated by my concurrence in the separate expression of *Commissioner Campbell*, because as a member of division 4, I had participated in the grant of authority, 86 I. C. C. 808, to the Missouri Pacific to acquire a large block of preferred stock of the Texas & Pacific and I had assumed that such acquisition meant practical control of the policy of the Texas & Pacific by the Missouri Pacific. The present record, however, clearly negatives that assumption. It shows that the Missouri Pacific has in fact not controlled the management of the Texas & Pacific, although it probably could exercise this control at any time if it desired to do so. Since the instant report of the majority continues the assumption shown by the new evidence to be incorrect, I must dissent. *Furthermore, under the conditions shown of record, especially with references to traffic in export grain, it is, in my judgment, distinctly in the public interest as well as in the interest of the Texas & Pacific and of the Louisiana Railway & Navigation Company that these carriers be left free to meet the rates of the competing carriers to Texas ports in their rates to New Orleans. In addition, the finding regarding unjust discrimination against Texas ports and undue preference of New Orleans in export traffic, in my judgment, rests upon precarious foundations.*" (Our italics).

Commissioner *Woodlock* again dissents to the report of December 23, 1929, and says,

> "The facts of record in this case, do not, in my opinion, constitute a violation of Section 3. Furthermore, the *Ashland Fire Brick* doctrine, from which radical departure was made recently in the *Duluth Chamber of Commerce case*, is, as I view it, the correct expression of the principles embodied in Section 3. These principles are an integral part of the fundamental theory of the transportation act, and to depart from them as the majority here does is to violate the spirit of that act in an important particular. On this point I refer to my dissenting expression in *Duluth Chamber of Commerce case*, 156 I. C. C. 156."

Commissioner *Porter* dissents to the report of December 23, 1929, without giving reasons.

We, therefore, have five Commissioners dissenting to the finding of the majority of the Commissioners that,

> "Upon further consideration we now find in No. 12798 that the present relationships of the assailed carload rates on export, import, and coastwise traffic in grain and grain products; asphalt; bagging (cotton-bale covering), cotton-bale ties, and buckles; green coffee; cotton-factory products and related articles; cottonseed and peanut cake, meal, and oil; packing-house products and related articles, except soap; soap; and turpentine and related articles from or to points in Texas on the lines of the Texas & Pacific and the Louisiana Railway & Navigation Company of Texas are, and for the

> future will be, unduly prejudicial to Galveston and the other Texas ports taking the same rates, and unduly preferential of New Orleans."

In addition to the dissenting opinions of five of the commissioners to the report, *Foster*, Circuit Judge dissented from the opinion of the majority in the lower court, saying:

> "The rates which the order of the commission changes have been in effect for years, notwithstanding which Galveston has held her own and Houston has grown immeasureably as a port. The other Texas ports are negligible except as to the movement of oil. This traffic is exempted from the order, a somewhat inconsistent ruling. No doubt, as affecting a division of rates, a longer haul constitutes additional service to be paid for, but as affecting a shipper seeking to move his goods to and from the seaboard within reasonable limits, which do not seem to be exceeded in this case, it is immaterial and hardly to be considered service. It is evident that the Commission did not base its order merely on the additional length of haul, but took into consideration the superior natural advantages of New Orleans, and its greater facilities as a port. It is conceded that the plaintiffs carry the import and export traffic at a profit and without any undue burden upon other traffic. On the other hand, it is reasonably certain that if forced to inaugurate higher export rates to New Orleans than to Texas ports, none of which they reach over their own lines, their revenues will suffer greatly through loss of tonnage. I fail to see how the plaintiffs can be guilty of undue preference of New Orleans, or un-

> due prejudice to Texas ports by charging the same rate to both. The Commission was not authorized to equalize port advantages by an adjustment of rates. We have jurisdiction to review the order, and it should be set aside. Central R. R. Co. v. U. S. 257 U. S. 247, 42 S. Ct. 80, 66 L. ed. 217."

The dissenting commissioners, informed of the contents of the record, and experienced in rate-making, have pointed out its patent and fatal defects.

The majority report of December 23, 1929, makes no reference to the dissenting opinions in previous reports, and the errors in the record pointed out by Commissioners Hall and Woodlock, were not corrected. This is shown by the dissenting opinion of Commissioner Brainerd to the order of December 23, 1929.

We cannot add to such strong and unanswerable arguments as those contained in the dissenting commissioners' opinions, whose long emperience in the administration of the *Interstate Commerce Act*, as amended by the *Transportation Act*, 1920, makes their views of unusual importance. The dissenting commissioners and circuit judge have unquestionably interpreted the act and applied the facts of the case correctly.

The case of *Texas & Pacific Railway Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, dealt with an order of the Interstate Commerce Commission dealing with import and domestic traffic, in which the Commission ordered the Texas & Pacific Railway Company

to "cease and desist from carrying any article of imported traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in the foreign country adjacent to the United States, upon through bills of lading, destined to any place within the United States at any other than upon the inland tariff covering other freight from such port of entry to such place of destination or at any other than the same rates established in such inland tariff for the carriage of any other and like kind of freight in the elements of bulk, weight, value and expense of carriage. The railway company refused to comply with the order and the Interstate Commerce Commission brought suit against the railway company to enjoin it from further disobeying the said order.

The Commission based its order upon its authority under sections 2, 3, and 4, of the Act to Regulate Commerce, approved February 4, 1887, as amended by an act approved February 10, 1891. The requirements of section 3 under the said act as amended were the same as the requirements of section 3 (1) of the *Interstate Commerce Act*, as amended by the *Transportation Act, 1920*. The Supreme Court through Mr. *Justice Shiras* upheld the right of the Interstate Commerce Commission to bring the suit and discusses at length the powers delegated by the Congress to the Commission under the said section, and says,

> "As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of

commerce, of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the act to justify such a supposition.

So far from finding such language, we read the act in question to direct the Commission, when asked to find a common carrier guilty of a disregard of the act, to take into consideration all the facts of the given case—among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States who constitute the consumers and recipients of the merchandise carried; and that the attention of the Commission is not to be confined to the advantage of shippers and merchants who deal at or near the ports of the United States, in articles of domestic production. Undoubtedly the latter are likewise entitled to be considered, but we cannot concede that the Commission is shut up by the terms of this act to solely regard the complaints of one class of the community. We think that Congress has here pointed out that, in considering questions of this sort, the Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. It is self-evident that many cases may and do arise where, although the object of the carriers is to secure the traffic for their own purposes and upon their own lines, yet, nevertheless, the very fact that they seek, by the charges they make, to secure it, operates in the interest of the public."

The principle thus announced is applicable to the present case.

VIII.

CONCLUSION.

In order to serve the Port of New Orleans with equity and upon just and reasonable terms, the carriers whose lines reach that port should be allowed to initiate their own individual rates, as they are permitted to do by the Interstate Commerce Act.

The Port of New Orleans is entitled to participate in the commerce that enters and leaves the gulf ports from and to all parts of the world. There should be no rate barriers erected against the Port of New Orleans, nor should the policy of keeping the ports of Galveston and New Orleans on an equality as to coastwise, export and import rates, be disturbed except for imperative reasons, such, for instance, as carrying traffic below the cost of performing the service, which it is not proposed in this case to do.

No effort was made at any of the hearings before the Commission to show that the rates to New Orleans are unreasonable. On the contrary, the complainants have always insisted that the equalized rates to and from New Orleans produce for their lines coastwise, export and import traffic, when moving through the Port of New Orleans, at a profit to them. They have shown by affirmative and uncontradicted proof that the equalized rates do not burden any

other traffic, by being unreasonably low, or place an undue burden upon any other carrier or commerce, interstate or intrastate.

The Port of New Orleans offers facilities unequaled on the gulf coast for the prompt and efficient handling of commerce that seeks to use these facilities. It has regular sailings of steamships to all ports of the world, and offers advantages in handling export, import and coastwise traffic that the shippers of the interior desire to and will use, under an equalized rate adjustment.

Any rate adjustment which deprives the Port of New Orleans of any of the coastwise, export or import traffic it has heretofore enjoyed, or which under a reasonable and proper rate adjustment, it has a right to expect, will cause a diminution of such traffic through the port of New Orleans, will seriously affect the revenues of the port, endanger the large public investment in said port facilities and hamper the ability of the appellant railroads to properly perform their duties to the public. That the direct result of the said orders of the Commission, if enforced, will divert a large portion of coastwise, export and import tonnage from New Orleans to Galveston, cannot be denied, and seems to be admitted by all who have any knowledge of the effect of the said orders.

The Interstate Commerce Commission was created to foster commerce, not to destroy it. Its powers are great; but it was never intended that they should be used to build

up one port at the expense of another. Carriers serving these ports were given the right, under the act, to initiate rates. The rates so initiated, unless shown to be unreasonable, should not be arbitrarily increased by the addition of "differentials" which serve only to injure the commerce of the Port of New Orleans.

Never has it before been held that an individual carrier serving only one port, was guilty of a violation of section 3 of the Interstate Commerce Act, because it has equalized rates applying on foreign commerce moving through its port with those applying on the same kind of commerce moving through rival ports.

When individual states have attempted to discriminate against interstate commerce by erecting rate walls around their borders, the Interstate Commerce Commission has promptly interfered and set aside State rates that placed a competitive interstate shipper at a disadvantage as compared with his intrastate competitor. With the same solicitude for the welfare of interstate shippers whose trade is limited by an intrastate adjustment, the Interstate Commerce Commission should treat the competitive ports of different states, so that they may compete, and not render orders that, if enforced, make port and carrier competition impossible.

When the Constitution vested the Congress with the power "to regulate commerce with foreign nations and among the several states," it created the machinery which

could effectively prevent one state injuring another by rate and tariff barriers. It was recognized that rates that gave one shipper or locality an unreasonable or unjust advantage over another, would paralyze the business of the prejudiced shipper or locality. Commerce could not be fostered, nor could traffic freely move between the points having the rate disadvantage.

The Supreme Court has sustained such orders of the Commission when made after a full hearing and supported by evidence, but before entering an order removing discrimination the Commission has always investigated and determined the reasonableness or unreasonableness of the rates, rules or practices under consideration, and then proceeded to remove the discrimination by requiring the unreasonable rates, rules, or regulations to be abandoned and those found reasonable to be applied. We think that is a proper application of section 1 and section 3 of the act, when read together, as they must be.

In the *Shreveport Case* (H. E. & W. T. R. Co. v. United States) 234 U. S. 342, 58 L. ed. 1341, the Supreme Court, through Mr. Justice *Hughes*, now *Chief Justice*, says:

> "We find no reason to doubt that Congress is entitled to keep the highways of interstate communication open to interstate traffic upon fair and equal terms."

We think the same principle should govern in this case, and that the Commission should keep the ports, entrances

and termini of the "highways of interstate communication" open to coastwise, export and import traffic, and not erect a rate barrier under the guise of removing unjust discrimination that effectively closes the port of New Orleans to such traffic from the West.

The orders of the Commission destroy the policy of equalizing the rates to the ports of Galveston and New Orleans of more than thirty years' standing. Upon the faith of this equalization, the port of New Orleans has invested over One Hundred Million Dollars in port facilities, in order to encourage, foster, handle, and properly care for the commerce of the port. The diversion of the foreign and coastwise tonnage from a large territory from which a great portion of that tonnage originates, or to which it is destined, is not a mere arrangement of traffic; but is destructive of both transportation to and from, and commerce of the port of New Orleans, and if the orders of the Commission are enforced, the port of New Orleans will have idle millions invested in a ruined port, because of the destruction of the commerce of the port by the illegal, arbitrary, unreasonable, and unjust orders of the Interstate Commerce Commission.

The action of the Commission in depriving the Texas & Pacific and Louisiana Railway & Navigation Company of the right to serve the port of New Orleans at reasonable rates on traffic from and to points on their respective lines

to and from New Orleans, which are no higher than rates on similar traffic to Galveston is illegal, unlawful, arbitrary, unjust and unreasonable.

We submit that the court below erred in sustaining the orders complained of, and their decision should be reversed and the case remanded with instructions to reinstate the bill and grant the injunction, and we so pray.

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